

# Mediation's Potential Role in International Cultural Property Disputes

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*"Mortal!"—'twas thus she spoke—"that blush of shame  
Proclaims thee Briton, once a noble name;  
First of the might, foremost of the free,  
Now honour'd less by all, and least by me;  
Chief of thy foes shall Pallas still be found.  
Seek'st thou the cause of loathing?—look around.  
Lo! Here, despite war and wasting fire,  
I saw successive tyrannies expire.  
'Scaped from the ravage of the Turk and Goth,  
Thy country sends a spoiler worse than both.  
Survey this vacant, violated fane;  
Recount the relic torn that yet remain:  
These Cecrops placed, this Pericles adorn'd  
That Adrian rear'd when drooping Science mourn'd.  
What more I owe let gratitude attest—  
Know, Alaric and Elgin did the rest.  
That all may learn from whence the plunderer came,  
The insulted wall sustains his hated name . . ."*<sup>1</sup>

## I. INTRODUCTION

The clandestine looting of the world's archaeological and artistic heritage is a substantial problem.<sup>2</sup> From every corner of the world come

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<sup>1</sup> GEORGE GORDON, *The Curse of Minerva*, in BYRON'S POETICAL WORKS 142, 143 (1945), available at <http://www.mykeep.com/lordbyron/curseofminerva.html>. This poem recounts Lord Byron's shame at the desecration of the Parthenon at the hands of his countryman, Lord Elgin.

<sup>2</sup> Scholars estimate that the antiquities black market is third only to the drug and arms trades in the billions of dollars it generates on a yearly basis. Tjaco T. van den Hout, *Introduction*, in RESOLUTION OF CULTURAL PROPERTY DISPUTES: PAPERS EMANATING FROM THE SEVENTH PCA INTERNATIONAL LAW SEMINAR i, xviii (Int'l Bureau of the Permanent Ct. of Arb. ed., Kluwer Law Int'l 2004); see also Jordana Hughes, Note, *The Trend Toward Liberal Enforcement of Repatriation Claims in Cultural Property Disputes*, 33 GEO. WASH. INT'L L. REV. 131 (2000).

horror stories about its scope and degree.<sup>3</sup> In Mali, for example, looters have illegally excavated and sold thousands of artifacts abroad. The artifacts were produced by 600-year-old Sub-Saharan empires, 8,000-year-old Neolithic African hunter-gatherers, and the 500-year-old Dogon people.<sup>4</sup> In some places in Mali, looters have left behind landscapes blanketed with hundreds of pits—some as many as ten feet deep—out of which they have extracted African history.<sup>5</sup> It is estimated that 45% of Mali's archaeological sites have been looted to date.<sup>6</sup> From Europe comes word that Italy has suffered, among other things, the undocumented loss of over 4,000 Apulian vases from previously undisturbed ancient tombs.<sup>7</sup> Another European country, Bulgaria, suffered similarly when thieves stole 5,000 icons from important religious and archaeological sites in 1992 across the country.<sup>8</sup> Latin America has also failed to escape the din of illegal shovels and backhoes. Looting is so prevalent there that entire civilizations were ripped from the earth and placed

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For the purposes of this article, "looting" occurs when an object of archaeological or historical import is "removed illegally from archaeological context" and illicitly sold abroad. JOHN CARMAN, *AGAINST CULTURAL PROPERTY: ARCHAEOLOGY, HERITAGE AND OWNERSHIP* 17 (Richard Hodges ed., 2005). Such objects "include those excavated from sites in territories where all archaeological remains belong under law to the state; or when this does not apply, from sites which are subject to legal controls and protection; or to particular materials which are the property of the state regardless of context of disposition." *Id.* It is important to note that many scholars and treaties also consider objects taken from museums to be loot. *Id.* A recent example of this later definition of loot finds meaning in the thousands of artifacts stolen from the National Museum of Iraq shortly after the recent fall of Saddam Hussein. André Emmerich, *Improving the Odds: Preservation through Distribution*, in *WHO OWNS THE PAST? CULTURAL POLICY, CULTURAL PROPERTY, AND THE LAW* 247, 247 (Kate Fitz Gibbon ed., 2007).

<sup>3</sup> For case studies detailing the effects of looting in Thailand, Cambodia, China, India, Kenya, Somalia, Tanzania, the Republic of Niger, Belize, the United States, Syria, Jordan, Turkey, Cyprus, Italy, and Greece, see *TRADE IN ILLICIT ANTIQUITIES: THE DESTRUCTION OF THE WORLD'S ARCHAEOLOGICAL HERITAGE* (Neil Brodie, Jennifer Doole & Colin Renfrew eds., 2001).

<sup>4</sup> Joshua Hammer, *Looting Mali*, *SMITHSONIAN*, Nov. 2009, at 33, 36. France alone, for example, intercepted 10,150 Malian artifacts from 2005 to 2007. *Id.* at 37. Some artifacts taken from Mali have sold at auction for as much as \$275,000. *Id.* at 39.

<sup>5</sup> *Id.* at 40.

<sup>6</sup> CARMAN, *supra* note 2, at 16.

<sup>7</sup> Ricardo J. Elia, *Analysis of the Looting, Selling, and Collecting of Apulian Red-Figure Vases: A Quantitative Approach*, in *TRADE IN ILLICIT ANTIQUITIES: THE DESTRUCTION OF THE WORLD'S ARCHAEOLOGICAL HERITAGE* 145, 145–46 (Neil Brodie, Jennifer Doole & Colin Renfrew eds., 2001).

<sup>8</sup> CARMAN, *supra* note 2, at 16.

## MEDIATION'S POTENTIAL ROLE IN CULTURAL PROPERTY DISPUTES

onto the international antiquities market before scholars even knew they existed.<sup>9</sup> From Guatemala alone, looters smuggle up to 1,000 ancient pots a month.<sup>10</sup> Some estimate that looting in Central America employs several million people.<sup>11</sup>

Looting has two harmful consequences. First, looting denies many countries the ability to control and appreciate their histories and identities to the fullest possible extent because it strips countries of historical objects which they claim inform the pasts of their lands.<sup>12</sup> Second, looting decreases archaeology's ability to investigate the past at its most undisturbed and, therefore, informative state.<sup>13</sup> Thus, it should come as no surprise that source nations—nations from which the world and its museums derive their collections—have begun to demand the return of objects removed from their borders in ways which violate either their laws or alleged international norms.<sup>14</sup> So resonating are their claims that on November 14, 1970, the United Nation's Educational, Cultural and Scientific Organization (UNESCO) adopted the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (UNESCO Convention).<sup>15</sup> The UNESCO Convention, to which 120 States are party,<sup>16</sup> purports to make it illegal for States Parties and their

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<sup>9</sup> ROGER ATWOOD, *STEALING HISTORY: TOMB RAIDERS, SMUGGLERS, AND THE LOOTING OF THE ANCIENT WORLD* 12–13, 100 (2004).

<sup>10</sup> CARMAN, *supra* note 2, at 16.

<sup>11</sup> David Matsuda, *Subsistence Diggers*, in *WHO OWNS THE PAST? CULTURAL POLICY, CULTURAL PROPERTY, AND THE LAW* 255, 261 (Kate Fitz Gibbon ed., 2007).

<sup>12</sup> UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, pmbl, Nov. 14, 1970, 96 Stat. 2350, 823 U.N.T.S. 231 [hereinafter UNESCO Convention].

<sup>13</sup> Clemency Chase Coggins, *Archaeology and the Art Market*, in *WHO OWNS THE PAST? CULTURAL POLICY, CULTURAL PROPERTY, AND THE LAW* 221, 221 (Kate Fitz Gibbon ed., 2007). When archaeologists excavate, the relation objects have to one another and their physical surroundings are almost as informative as the information gleaned from the objects themselves. *Id.* Therefore, when a looter breaks into a site and removes its treasures, his or her actions destroy an object's context and thereby render the site and whatever he or she has taken almost completely worthless. *Id.*

<sup>14</sup> JAMES CUNO, *WHO OWNS ANTIQUITY? MUSEUMS AND THE BATTLE OVER OUR ANCIENT HERITAGE* xxxii (2008).

<sup>15</sup> UNESCO Convention, *supra* note 12, pmbl.

<sup>16</sup> UNESCO, States Parties to the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (2010), <http://portal.unesco.org/la/convention.asp?KO=13039&>

citizens or institutions to import, export, or transfer cultural property in contravention of the patrimony laws of other States Parties.<sup>17</sup> It does this because, in its opinion, a country's "cultural property constitutes one of the basic elements of civilization and national culture . . . and . . . its true value can be appreciated only in relation to the fullest possible information regarding its origin, history and traditional setting."<sup>18</sup>

However, despite the intentions of the UNESCO Convention and the goodwill of a number of States Parties, many source nations struggle to regain looted cultural property from the countries to which it was exported. Sometimes this occurs because the importing country either failed to ratify the Convention or adopted it with Convention-neutering reservations.<sup>19</sup> Other times, an importing country might feel legally obligated to repatriate looted cultural property, but it does not think that the protesting source nation has presented it with enough evidence to prove that the property it holds was illegally exported in the first place.<sup>20</sup> These realities leave us with three categories of cultural property which could be the subject of repatriation claims: (1) that which source nations can prove was illegally exported in contravention of their laws,<sup>21</sup> (2) that which source nations cannot prove was

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language=E&order=alpha (last visited Aug. 19, 2010). This URL address links directly to UNESCO's record of which Nations have ratified or accepted the Convention or have issued a notification of succession.

<sup>17</sup> UNESCO Convention, *supra* note 12, art. 3 ("The import, export or transfer of ownership of cultural property effected contrary to the provisions adopted under this Convention by the States Parties thereto, shall be illicit."). Article 1 of the Convention defines cultural property as "property which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science." *Id.* art. 1. Such property must also fall into a category such as "property relating to history," products of proper and clandestine archaeological excavations, "elements of artistic or historical monuments or archaeological sites which have been dismembered," antiquities over 100 years old, and pictures, paintings, sculptures, and engravings. *Id.* Because of Articles 1 and 3, States Parties have almost absolute power in determining what constitutes cultural property and whether or not that property may leave their borders. Kevin F. Jowers, Comment, *International and National Legal Efforts to Protect Cultural Property: The 1970 UNESCO Convention, the United States, and Mexico*, 38 TEX. INT'L L.J. 145, 151 (2003).

<sup>18</sup> UNESCO Convention, *supra* note 12, pmbl.

<sup>19</sup> See *infra* Part II.

<sup>20</sup> *Id.*

<sup>21</sup> An example of this type of cultural property is that of Turkey's famed "Lydian Hoard." SHARON WAXMAN, LOOT: THE BATTLE OVER THE STOLEN TREASURES OF THE ANCIENT WORLD 149 (2008). The Lydian Hoard, a collection of 363 gold and silver pieces (e.g., acorn-shaped pendants hung from a golden necklace, bracelets decorated

## MEDIATION'S POTENTIAL ROLE IN CULTURAL PROPERTY DISPUTES

illegally exported from their borders, though circumstantial evidence suggests that this was the case,<sup>22</sup> and (3) that which was exported from their borders long before it was illegal to do so.<sup>23</sup> This latter category of cultural property is particularly contentious because it usually involves works that source nations consider so essential to their national identities that separation from them amounts to some type of sociopolitical insult.<sup>24</sup> The second

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with lions' heads, silver bowls, and a golden brooch in the shape of a hippocampus) from the Lydian Kingdom circa 500 B.C.E., sat in the Metropolitan Museum of Art from 1966 to 1993. *Id.* at 146–51. In 1993, Turkey convinced the looters—small farmers from the Turkish towns of Gure and Usak—to admit that they had broken into a tomb, stolen the Hoard, and sold it illegally to a middle man who shipped it out of Turkey, counter to a Turkish cultural patrimony law claiming all such finds for the State. *Id.* at 148–49. Armed with this type of evidence, Turkey filed a lawsuit in Manhattan federal court against the Met. *Id.* at 150. This suit quickly encouraged the Museum to return the Hoard lest it face criminal charges under U.S. stolen property laws. *Id.*

<sup>22</sup> An example of this type of cultural property is the Cleveland Museum of Art's (CMA) bronze statue of Apollo Sauroktonos (Apollo the Lizard-Slayer). Steven Litt, *God of Mystery: Gaps in Our Apollo's History Makes It a Focus of Debate over Global Antiquities Trade*, CLEVELAND PLAIN DEALER, Feb. 17, 2008, at J1. Greece alleges that the statue was illegally fished out of the Ionian Sea in the early 1990s. *Id.* To back this claim, Greece has noted that the statue's "official" history of ownership has large gaps in it, which suggest that at some point the history of ownership was falsified to appear as if it had come from a private collection assembled over 100 years ago when it was legal to remove such works from Greece. *Id.* Given that, the statue's legal status remains uncertain because specialists at the CMA allege that they have scientific evidence proving that the bronze statue has aged in a manner consistent with sitting for a century in a museum collection, not at the bottom of the sea for thousands of years. *Id.*

<sup>23</sup> See CUNO, *supra* note 14, at 9.

<sup>24</sup> The most notable example of this type of cultural property is the Elgin Marbles—portions of the 2,500-year-old frieze, metopes, and sculpted figures that used to line the top of the Parthenon. Kate Fitz Gibbon, *The Elgin Marbles: A Summary*, in WHO OWNS THE PAST? CULTURAL POLICY, CULTURAL PROPERTY, AND THE LAW 109, 109–11 (Kate Fitz Gibbon ed., 2007). From 1801 to 1812, Thomas Bruce, seventh Earl of Elgin and the British Ambassador to the Ottoman Empire, systematically chiseled the works named after him off the Parthenon with permission from an apathetic Ottoman official. *Id.* at 109. In 1816, he sold the collection to the British Museum. *Id.* at 113. It sits there to this day despite Greece's continued requests for its return. *Id.* at 113–14. Another example is the Rosetta Stone, which also resides in the British Museum. CUNO, *supra* note 14, at xii. Discovered by a French military officer in Rosetta, Egypt in 1799, the Stone lists in Egyptian hieroglyphics, Egyptian demotic, and ancient Greek "the terms of an agreement between a synod of Egyptian priests and the Macedonian ruler of Egypt, Ptolemy V, on March 27, 196 B.C." *Id.* Even though the content of the Stone is relatively insignificant, it is one of history's most important finds because it gave Jean-François Champollion the ability to decipher Egyptian hieroglyphics in the early 1800s. *Id.* at xiii. The Egyptian

category usually involves pieces in either private or museum collections which have no provenance.<sup>25</sup> Unprovenanced pieces bear no origination information. Therefore, if a source nation believes that an unprovenanced piece in a foreign collection was discovered within and illegally exported from its borders, the nation will have to rely on relatively unpersuasive evidence to prove its ownership claim: e.g., the object's patina buildup,<sup>26</sup> the artist or civilization responsible for its creation,<sup>27</sup> or the object-unique indents it allegedly left in the earth of its source nation.<sup>28</sup> Some scholars persuasively argue that the majority of the world's private and museum collections consist of looted goods because (a) the majority of these collections contain unprovenanced pieces, and (b) if an object were

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government has repeatedly called for the Stone's return because of its importance to the understanding of ancient Egyptian history and its discovery within Egypt's borders. *Id.* at xiv. The British have refused to return the Stone, arguing that at the time of its taking there was no independent Egyptian state and therefore the current Egyptian state has no claim of ownership upon which it can plead its case. *Id.*

<sup>25</sup> An object's "provenance" is its core biographical information, i.e., when it was found, where it was found, and who has owned the object since it was found. CUNO, *supra* note 14, at xv.

<sup>26</sup> See Litt, *supra* note 22, at J1. Some objects build a patina—a chemical coating—on their surfaces in response to various environmental factors. See NINA BURLEIGH, UNHOLY BUSINESS: A TRUE TALE OF FAITH, GREED AND FORGERY IN THE HOLY LAND 34 (2008). Scientists can examine patinas to assess everything from an object's age to the environment in which it has resided since it was excavated. See *id.* This is significant because it is possible for museums to argue that unprovenanced objects subject to repatriation claims were in their collections long before it became illegal to export those objects from their source nations. Using patina analysis, source nations can try to prove that museums are lying—that according to the chemical buildup on an object, it has spent years in the ground rather than in a sterile museum environment as claimed.

<sup>27</sup> See CUNO, *supra* note 14, at xxxii, 9. Such an argument may go something like this: because an object is the product of ancient empire A and modern nation B geographically exists in the same place as A, anything made by A must come from B's territory. Thus, anything made by A belongs to B.

<sup>28</sup> For example, in a New York case to recover a fourth-century copper cauldron and the Roman silver it contained, the Republic of Hungary claimed that the cauldron and the silver originated in the Republic because the cauldron allegedly left a cauldron-sized indent in the earth of the wine cellar in which Hungary thought the cauldron was hidden before it and its silver were sold abroad. Harvey Kurzweil, Leo V. Gagon & Ludovic De Walden, *The Trial of the Sevso Treasure: What a Nation Will Do in the Name of Its Heritage*, in WHO OWNS THE PAST: CULTURAL POLICY, CULTURAL PROPERTY, AND THE LAW 83, 86 (Kate Fitz Gibbon ed., 2007). This argument ultimately failed when it surfaced that a wine cask made the indentation. *Id.* at 87.

## MEDIATION'S POTENTIAL ROLE IN CULTURAL PROPERTY DISPUTES

excavated and exported legally or during a time before patrimony laws, logic dictates that there would be no reason to display it sans provenance.<sup>29</sup>

Source nations have begun placing total embargos on the export of any cultural property found within their borders—whether licitly or illicitly discovered—because of the repatriation struggles they face, the rate at which cultural property exits their borders via illegal back channels, and the UNESCO Convention's license to declare whatever they find to be "historically important protected cultural property."<sup>30</sup> These types of protections, which some call "cultural patrimony laws" and others "nationalist retentionist cultural property laws,"<sup>31</sup> are problematic because they threaten to stifle the legitimate international trade of cultural property; a trade which undermines "parochialism and ignorance," develops "citizens' tastes and sympathies," broadens horizons, enriches education, and stimulates the creation of new art and international understanding.<sup>32</sup> Imagine a scenario in which museums and private collectors all around the world will no longer be able to acquire pieces excavated in nations in which they do not reside.<sup>33</sup> If the systems in place to deal with the import and export of cultural

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<sup>29</sup> Christopher Chippindale & David W.J. Gill, *Material Consequence of Contemporary Classical Collecting*, 104 AM. J. ARCHAEOLOGY 463, 464, 476 (2000). This study bases its conclusions upon an examination of the collections of seven of the world's finest museums: Metropolitan Museum of Art in New York; the J. Paul Getty Museum of Art in Los Angeles, California; the Royal Academy of Arts in London; the Israel Museum in Jerusalem; the Fitzwilliam Museum at the University of Cambridge; the Arthur M. Sackler Art Museum of the Harvard Art Museums; and the San Antonio Museum of Art. *Id.* at 465–66. Chippindale and Gill conclude that of the 1,396 pieces examined, 1,045 displayed no provenance. *Id.* at 476.

<sup>30</sup> PAUL M. BATOR, *THE INTERNATIONAL TRADE IN ART* 38 (U. Chi. Press 1983); see also CUNO, *supra* note 14, at 33–34; Hughes, *supra* note 2, at 132.

<sup>31</sup> CUNO, *supra* note 14, at xxxiv.

<sup>32</sup> BATOR, *supra* note 30, at 30–32.

<sup>33</sup> Some might argue that museums can always turn to the black market for looted goods, thus preserving the public's access to objects of historical import. However, this option is becoming more unlikely each day for two reasons. First, reputable museums all across the world, starting with The University of Pennsylvania Museum of Archaeology and Anthropology in 1970, have begun to declare that they will no longer purchase unprovenanced (i.e., looted) objects. CUNO, *supra* note 14, at 29–30. Second, with the improvement of modern communication, the advent of the Internet and online cataloging, and heightened source nation watchfulness, museums no longer function unchecked. Hughes, *supra* note 2, at 147. Instead, some source nations watch the museums within their borders and their acquisitions like hawks, just waiting to identify an object of questionable origin. *Id.*

property remain unchanged, then this is exactly the type of artistically-stifled and jingoistic world in which we and our children may someday live.<sup>34</sup>

This note discusses the repatriation of cultural property and proposes that mediation, a form of alternative dispute resolution, might be the best means by which source nations could equitably regain exported objects over which they claim cultural ownership. It accomplishes these two tasks in three parts. Part II discusses how market nations—nations which import cultural property—regulate foreign art, artifacts, and antiquities in ways which undermine the intent of the UNESCO Convention. Part III defines mediation and, through a comparative analysis of other international dispute resolution mechanisms, outlines why mediation is the best means by which the world can equitably settle its international cultural property disputes. Part IV, taking the mediation principles that the second section highlights, identifies all the disputant-stakeholders invested in the international trade of cultural property—e.g., market and source nations, museums, archaeologists, and the public—and briefly describes their interests. This part also presents a few options for disputant-stakeholders to consider when they engage in mediation over the repatriation of cultural property.

## II. MARKET NATIONS, TREATIES, AND CULTURAL PROPERTY REGIMES

This section examines the interaction between the UNESCO Convention and market nation laws governing the transfer of cultural property in order to prove that, as applied, they fail to equitably protect the interests of source nations.<sup>35</sup> The laws discussed herein come from five market nations who

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<sup>34</sup> There are a few examples of systemic failures already occurring. For example, when the Louvre refused to negotiate the return of a series of Pharonic antiquities, Egypt declared that it would no longer cooperate with France to display legally-acquired Egyptian antiquities in any French museums. Christophe de Roquefeuil, *Egypt Breaks Ties with France's Louvre Museum*, DAILY NEWS EGYPT, Oct. 7, 2009, available at [http://www.thedailynewsegypt.com/index.php?option=com\\_content&view=article&id=108575&catid=1&Itemid=183](http://www.thedailynewsegypt.com/index.php?option=com_content&view=article&id=108575&catid=1&Itemid=183). Another such example comes from 2007, when Italy threatened to completely embargo the export of Italian antiquities to the J. Paul Getty Museum in Los Angeles, California unless the Getty agreed to return over forty pieces of Italy's stolen cultural property. Diane Haithman, *Getty Accord Lands Rarity*, L.A. TIMES, Mar. 24, 2009, at C1.

<sup>35</sup> There is another treaty which seeks to govern the trade of cultural property: the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects. UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, June 24, 1995, 34 I.L.M. 1330, available at <http://www.unidroit.org/english/conventions/1995culturalproperty/1995culturalproperty-e.htm> [hereinafter UNIDROIT Convention]. Like the UNESCO



## MEDIATION'S POTENTIAL ROLE IN CULTURAL PROPERTY DISPUTES

possess some of the world's largest collections of foreign cultural property: the United States, the United Kingdom, Japan, Switzerland, and Australia.<sup>36</sup> It is important to note that where market nations have passed laws which acknowledge the interests of source nations (some of which are allegedly "in conjunction" with the UNESCO Convention), those laws only apply to cultural property that entered their borders after the enactment of their own cultural property laws *and* those of the source nations themselves. Thus, source nations currently have no legal recourse to recover cultural property taken from within their borders before the world became legally sensitive to its value to national identity.<sup>37</sup> This means that, of the three categories of cultural property mentioned in the Part I, under current legal regimes market nations will only consider returning cultural property which (a) they or their citizens have acquired in roughly the past twenty years *and* (b) source nations can prove was looted.<sup>38</sup> Furthermore, whereas the UNESCO Convention leaves it to source nations to define what constitutes protected cultural property, the cultural property laws that market nations enact (even those who have allegedly ratified the UNESCO Convention) reserve that power for the market nations themselves.<sup>39</sup> Therefore, unless a market nation chooses to declare that an object is the protected cultural property of a source nation, no amount of source nation protest will subject that object to repatriation under current legal regimes.<sup>40</sup> This is the current status of the

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Convention, the UNIDROIT Convention orders States Parties to return stolen and illegal exported "cultural objects" to source nations who request their return. *Id.* art. 1. This paper does not discuss this Convention because the international community has almost completely ignored it. See UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, Status of Signature Ratification Entry into Force and Declarations, available at <http://www.unidroit.org/English/Implement/i-95.pdf>. It has been ignored for two reasons. First, source nations do not like the fact that articles 4(1) and 6(1) of the UNIDROIT Convention require that they pay restitution to the current "owners" of their cultural property. S.R.M. MACKENZIE, GOING, GOING, GONE: REGULATING THE MARKET IN ILLICIT ANTIQUITIES 95 (Inst. of Art and Law 2005). Second, the UNIDROIT Convention gives source nations so much leeway in what they may define as their cultural property subject to repatriation that source nations do not want to ratify the Convention and subject themselves and their citizens to unreasonable repatriation claims. UNIDROIT Convention, *supra* note 35, art. 2.

<sup>36</sup> See BATOR, *supra* note 30, at 16.

<sup>37</sup> See generally *infra* Part II.

<sup>38</sup> See *supra* Part I.

<sup>39</sup> BATOR, *supra* note 30, at 51.

<sup>40</sup> See generally *infra* Part II.

cultural property world. It is an uphill, litigation-based battle in which source nations have few rights and little chance of success.

### A. *Cultural Property Regulation in the United States*

The United States is one of the world's leading collectors of art, antiquities, and objects of historic import. Its museums—e.g., the Metropolitan Museum of Art, the J. Paul Getty Museum, and the Cleveland Museum of Art—are world-renowned for their collections. Its private citizens hold vast amounts of culturally significant works as well. As a depository of so much of the world's history, source nations regularly accuse Americans and their museums of acquiring cultural property that was illegally exported from their borders. Because the U.S. ratified the UNESCO Convention, it would be natural to assume that the Convention's precepts—i.e., that no nation will retain ownership of cultural property taken from another in contravention of the other's laws—would apply to the U.S., and that the U.S. would therefore regularly repatriate objects that source nations call their cultural property. However, that is not the case.

The U.S. implemented its version of the UNESCO Convention in 1983 when Congress enacted the Cultural Property Implementation Act (CPIA).<sup>41</sup> As a part of the ratification process, the U.S. did two things. First, it declared an understanding to the Convention: "The United States understands the provisions of the Convention to be neither self-executing nor retroactive."<sup>42</sup> Second, it used the CPIA to define how the Convention applies within its borders. When combined, these actions mean that nothing in the Convention applies to the U.S. unless the CPIA has implemented it.

What does the CPIA implement? It implements three strategies for curbing the illicit trade of antiquities.<sup>43</sup> First, in recognition of Article 9 of the UNESCO Convention,<sup>44</sup> § 2602 of the CPIA authorizes the President to

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<sup>41</sup> CUNO, *supra* note 14, at 36. The CPIA is codified at 19 U.S.C. §§ 2601–2613 (2006).

<sup>42</sup> UNESCO, Declarations and Reservations, Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (2010), *available at* [http://portal.unesco.org/en/ev.php-URL\\_ID=13039&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html#RESERVES](http://portal.unesco.org/en/ev.php-URL_ID=13039&URL_DO=DO_TOPIC&URL_SECTION=201.html#RESERVES).

<sup>43</sup> See, e.g., Jowers, *supra* note 17, at 155.

<sup>44</sup> Article 9 reads:

Any State Party to this Convention whose cultural patrimony is in jeopardy from pillage of archaeological or ethnological materials may call upon other States

## MEDIATION'S POTENTIAL ROLE IN CULTURAL PROPERTY DISPUTES

place importation restrictions on specifically identified pieces of cultural property at the request of States Parties to the UNESCO Convention when the President determines that the requesting states' specifically identified cultural property is in danger of pillage.<sup>45</sup> Second, § 2603 permits the President, on his or her own initiative, "if [he or she] determines that an emergency condition applies with respect to any archaeological or ethnological material of any State Party,"<sup>46</sup> to wholly deny entrance into the United States of any cultural property from a signatory State. The property must be:

(1) a newly discovered type of material which is of importance for the understanding of the history of mankind and is in jeopardy from pillage, dismantling, dispersal, or fragmentation; (2) identifiable as coming from any site recognized to be of high cultural significance if such site is in jeopardy from pillage, dismantling, dispersal, or fragmentation which is, or threatens to be, of crisis proportions; or (3) a part of the remains of a particular culture or civilization, the record of which is in jeopardy from pillage, dismantling, dispersal, or fragmentation which is, or threatens to be, of crisis proportions; and application of the import restrictions . . . would, in whole or in part, reduce the incentive for such pillage, dismantling, dispersal or fragmentation.<sup>47</sup>

Finally, § 2607 allows the President to prevent any cultural property that has been stolen from a signatory State's museum system or any of its "religious or secular public monument[s]" from entering the U.S.<sup>48</sup> Though this aligns with Article 7(b)(1) of the Convention, it fails to account for Article 7(a) which declares that all signatory States will "take the necessary measures . . . to prevent museums and similar institutions within their territories from acquiring cultural property originating in another State Party

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Parties who are affected. The States Parties to this Convention undertake, in these circumstances, to participate in a concerted international effort to determine and to carry out the necessary concrete measures, including the control of exports and imports and international commerce in the specific materials concerned. Pending agreement each State concerned shall take provisional measures to the extent feasible to prevent irremediable injury to the cultural heritage of the requesting State.

UNESCO Convention, *supra* note 12, art. 9.

<sup>45</sup> 19 U.S.C. § 2602(a)(1)(A) (2006).

<sup>46</sup> *Id.* § 2603(b).

<sup>47</sup> *Id.* § 2603(a)(1)–(3).

<sup>48</sup> *Id.* § 2607; *see also* Jowers, *supra* note 17, at 155.

which has been illegally exported after entry into force of this Convention, in the States concerned.”<sup>49</sup> Any property entering the U.S. that violates the CPIA is subject to seizure, forfeiture,<sup>50</sup> and repatriation.<sup>51</sup>

Despite the CPIA’s grants of Presidential power, it ultimately fails to implement the full purpose of the Convention: to make it completely illegal for individuals and organizations to import objects that source nations claim as their nontransferable cultural property.<sup>52</sup> As the CPIA attests, America’s commitment to the UNSECO Convention extends only to protecting cultural property which (1) the President has declared in need of protection or (2) has been stolen from foreign museums or monuments. Thus, unless cultural property meets either of these exigencies under the CPIA, it can freely enter the U.S. regardless of the legality of its origins in the eyes of source nations.<sup>53</sup> Therefore, under the CPIA, an American traveling to Peru can buy a figurine recently excavated from an Incan village and bring it back to the U.S. in contravention of Peruvian antiquities law unless the President has made an agreement with Peru that limits the importation of exactly such an artifact<sup>54</sup> or has determined on his own initiative that Incan antiquities merit emergency protections.

Furthermore, because the CPIA is forward-looking, it does not apply to any objects within the U.S. before its enactment.<sup>55</sup> Thus, any pieces of cultural property that were in the U.S. before 1983 will remain where they sit regardless of their provenance. Even though these realities grate against the spirit of the Convention, because the Convention does not contain penalties for non-compliance, the U.S. or any other signatory nation may ignore its

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<sup>49</sup> UNESCO Convention, *supra* note 12, art. 7(a).

<sup>50</sup> 19 U.S.C. § 2609(a) (2006); *see also* Jowers, *supra* note 17, at 157.

<sup>51</sup> 19 U.S.C. §§ 2609(b)(1), (c)(2)(A) (2006); *see also* Jowers, *supra* note 17, at 157.

<sup>52</sup> CUNO, *supra* note 14, at 43.

<sup>53</sup> James A.R. Nafziger, *Seizure and Forfeiture of Cultural Property by the United States*, 5 VILL. SPORTS & ENT. L.J. 19, 27 (1998).

<sup>54</sup> Fortunately for Peruvians, Peru and the U.S. entered into exactly such a bilateral agreement in 1981. *See generally* Agreement for the Recovery and Return of Stolen Archaeological, Historical and Cultural Properties, U.S.-Peru, Sept. 15, 1981, 33 U.S.T. 1608.

<sup>55</sup> For examples of the limitations that the CPIA places on illegally imported cultural property in the United States, *see* 19 U.S.C. § 2611 (2006).

## MEDIATION'S POTENTIAL ROLE IN CULTURAL PROPERTY DISPUTES

fundamental principles and implement only those provisions which it feels obligated to apply.<sup>56</sup>

The question then becomes, how can foreign states reach into the U.S. to recapture pieces of their heritage which were illegally taken from them when the CPIA and the Convention do not provide them with the necessary recourse? The most effective means is through the use of the National Stolen Property Act (NSPA).<sup>57</sup> Two United States court of appeals cases explain how this is possible.

The first, *United States v. McClain*, dealt with a group of American antiquities smugglers charged under (1) NSPA § 2314 with “conspiring to transport and receiving through interstate commerce certain . . . artifacts . . . knowing these artifacts to have been stolen,”<sup>58</sup> and (2) NSPA § 2315 with “receiving, concealing, bartering, and selling” the same.<sup>59</sup> The charges arose after the defendants took various pre-Columbian artifacts out of Mexico and tried to sell them to the Mexican Cultural Institute in San Antonio, Texas.<sup>60</sup> Mexican officials at the Institute contacted the FBI claiming that the artifacts were most likely stolen from Mexico counter to a 1972 Mexican patrimony law which declares “all archaeological objects [found] within [Mexico after 1972], movables and immovables, to be

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<sup>56</sup> JOHN HENRY MERRYMAN, *The Nation and the Object*, in THINKING ABOUT THE ELGIN MARBLES: CRITICAL ESSAYS ON CULTURAL PROPERTY, ART AND LAW 158, 158 (2000).

<sup>57</sup> National Stolen Property Act, 18 U.S.C. §§ 2311–2323 (2006). For a brief overview of the NSPA, see Nafziger, *supra* note 53, at 23.

<sup>58</sup> *United States v. McClain*, 545 F.2d 988, 992 (5th Cir. 1977). 18 U.S.C. § 2314 (2006) states:

Whoever transports, transmits, or transfers in interstate or foreign commerce any goods, wares, merchandise, securities or monies, of the value of \$5,000 or more, knowing the same to have been stolen, converted or taken by fraud . . . shall be fined under this title or imprisoned not more than ten years or both.

<sup>59</sup> *McClain*, 545 F.2d at 992. 18 U.S.C. § 2315 (2006) states:

Whoever receives, possesses, conceals, stores, barter, sells, or disposes of any goods, wares, or merchandise, securities, or money of the value of \$5,000 or more, or pledges or accepts as security for a loan any goods, wares, or merchandise, or securities, of the value of \$500 or more, which have crossed a State or United States boundary after being stolen, unlawfully converted, or taken, knowing the same to have been stolen, unlawfully converted, or taken . . . shall be fined under this title or imprisoned not more than ten years or both.

<sup>60</sup> *McClain*, 545 F.2d at 992–93. No one ever said smugglers were smart.

the property of the Nation.”<sup>61</sup> After the defendants admitted to an FBI secret informer that they had taken the artifacts out of Mexico in contravention of its 1972 law and they agreed to an alleged sale price of the artifacts for well over the \$5,000 NSPA threshold, the FBI arrested them.<sup>62</sup>

When a district court jury convicted the smugglers, they appealed to the Fifth Circuit arguing that the NSPA did not apply to them because the artifacts were not “stolen” according to the word’s definition under the NSPA.<sup>63</sup> They claimed that Mexico had no property rights over the artifacts under the NSPA until they had physically possessed the artifacts—no matter what Mexico had declared legislatively.<sup>64</sup> The Fifth Circuit disagreed.<sup>65</sup> It held that to satisfy the NSPA’s definition of “stolen,” the defendants needed only to obtain “that which belongs rightfully to another and deprives that owner of the rights and benefits of ownership.”<sup>66</sup> The 1972 law granted all property rights in any archaeological materials discovered in Mexico after 1972 to Mexico, regardless of whether or not the Mexican government knew of their existence.<sup>67</sup> Therefore, if the defendants had in fact removed the artifacts from Mexico after 1972 (which they admitted they did), then they would have violated the NSPA.<sup>68</sup> The timing and existence of the law were critical to the Fifth Circuit’s analysis. It concluded: “We hold that a declaration of national ownership is necessary before illegal exportation of an article can be considered theft, and the exported article considered ‘stolen,’ within the meaning of the [NSPA].”<sup>69</sup> In other words, the court held that in order for a foreign nation to use the NSPA to recover cultural property within the U.S., it must have passed a law granting it ownership over the property in question.<sup>70</sup>

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<sup>61</sup> *Id.* at 991–92.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 994.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 1000.

<sup>66</sup> *McClain*, 545 F.2d at 995.

<sup>67</sup> *Id.* at 1000.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> This concept was important in *McClain* where the Fifth Circuit reversed and remanded the case back to the district court because the district court originally failed to officially consider whether the artifacts in question had been discovered in Mexico before 1972. *Id.* at 1003. If they had been discovered before 1972, then Mexico’s law did not apply to the defendants and the NSPA could not reach them. *Id.*

## MEDIATION'S POTENTIAL ROLE IN CULTURAL PROPERTY DISPUTES

The second case is *United States v. Schultz*.<sup>71</sup> This case dealt with an American citizen charged with receiving “stolen Egyptian antiquities that had been transported in interstate and foreign commerce” in violation of § 2315 of the NSPA.<sup>72</sup> Over the course of roughly five years, Schultz and a partner, a British national by the name of Parry, conspired to smuggle various ancient Egyptian works of art out of Egypt and into the U.S.<sup>73</sup> Their operation went to formidable lengths to circumvent Egyptian and U.S. laws. First, the men would identify an object they liked, such as a bust of Pharaoh Amenhotep III<sup>74</sup> or three limestone stelae,<sup>75</sup> and coat it in plaster. This coating gave it the appearance of a cheaply-made souvenir, and enabled Schultz and Parry to smuggle it out of Egypt.<sup>76</sup> Second, once they had removed something from Egypt, they declared it a part of the “Thomas Alcock Collection,” a fictitious collection of art allegedly brought out of Egypt by one of Parry’s relatives in the 1920s, before Egypt made the export of such collections illegal.<sup>77</sup> After U.S. authorities discovered Schultz’s ruse, a jury found him guilty on the sole count of the indictment.<sup>78</sup> Schultz appealed the finding, arguing that because no one owned the antiquities he moved from Egypt, he could not be convicted of receiving stolen property under the NSPA.<sup>79</sup>

The Second Circuit rejected Schultz’s argument.<sup>80</sup> Like Mexico, Egypt had a cultural patrimony law which declared (1) that all antiquities discovered after 1983 were property of the Egyptian government and (2) that it was illegal, as of 1983, to trade in antiquities.<sup>81</sup> Because this law clearly vested ownership rights in Egypt over all artifacts discovered therein after 1983, and because Egypt proved that the artifacts which Schultz conspired to receive were discovered after that date (the Egyptian police convinced the Egyptian middlemen to give Schultz up), the court affirmed that Schultz had

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<sup>71</sup> *United States v. Schultz*, 333 F.3d 393 (2d Cir. 2003).

<sup>72</sup> *Id.* at 395.

<sup>73</sup> *Id.* at 396.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 398.

<sup>76</sup> *Id.* at 396.

<sup>77</sup> *Schultz*, 333 F.3d at 396.

<sup>78</sup> *Id.* at 398.

<sup>79</sup> *Id.* at 396.

<sup>80</sup> *Id.* at 410.

<sup>81</sup> *Id.* at 399–400.

violated § 2315 of the NSPA.<sup>82</sup> In making this decision, the Second Circuit relied heavily upon *McClain*.<sup>83</sup>

These cases present us with a fundamental question. As asked by William G. Pearlstein, a noted art law attorney:

Why would any foreign nation go to the time, effort, and expense of applying for import restrictions under the [CPIA], which by definition must always be . . . subject to the satisfaction of strict statutory determinations, when it can simply cultivate good working relationships with customs agents and the Justice Department and obtain the protections of US criminal laws and customs police at the expense of US taxpayers?<sup>84</sup>

In other words, why bother with bilateral trade agreements limiting American access to certain types of artifacts, when source nations can turn American law against American traffickers of stolen property? This is an excellent question given some of the recent successes that foreign nations have had in using the NSPA (and the threat of the NSPA) to reach into the U.S. to recover antiquities.<sup>85</sup> However, it is important to note that the use of

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<sup>82</sup> *Id.* at 410.

<sup>83</sup> *Schultz*, 333 F.3d at 403–04. The Second Circuit took its analysis one step further than the Fifth Circuit did in *McClain*. One of Schultz’s arguments was that the court had no right to convict him of violating § 2315 of the NSPA when Congress had enacted a measure—the CPIA—specifically designed to deal with *all* matters of cultural property within the U.S. *Id.* at 408. The court disagreed, reasoning that Congress never intended the CPIA to supplant any portion of the NSPA. *Id.* To support this assertion, the Second Circuit cited two portions of the Senate report on the CPIA—S. Rep. No. 97-564, at 22 and 33. Both portions of the Senate report essentially said that the CPIA “affects neither existing remedies available in state or federal courts nor laws prohibiting the theft and the knowing receipt and transportation of stolen property in interstate and foreign commerce.” *Id.*

<sup>84</sup> William G. Pearlstein, *Cultural Property, Congress, the Courts, and Customs: The Decline and Fall of the Antiquities Market?*, in WHO OWNS THE PAST? CULTURAL POLICY, CULTURAL PROPERTY, AND THE LAW 9, 19 (Kate Fitz Gibbon ed., 2007).

<sup>85</sup> An example will illustrate this point. It deals with the famous Euphronios krater, a 2,500-year-old Greek vase that stands eighteen inches tall and twenty-one inches across. WAXMAN, *supra* note 21, at 187. From 1972 to 2008, this krater—which displays two masterfully painted red-figure scenes from Greek mythology—stood unmolested in the Metropolitan Museum of Art as the best and most complete example of a work by the Greco-Roman world’s most renowned painter, Euphronios. *Id.* In 1995, Swiss police raided the Geneva warehouse of Giacomo Medici, an antiquities dealer, and discovered evidence that in 1971 Medici had purchased the krater from two Italian tomb raiders who had broken into a previously undiscovered Roman tomb at the necropolis of Cerveteri



## MEDIATION'S POTENTIAL ROLE IN CULTURAL PROPERTY DISPUTES

the NSPA to cut off the illegal sale of antiquities to Americans might ultimately amount to nothing more than the proverbial “finger in the dam.”

First, there is no guarantee that an American court will accept the proof that a source nation offers to validate its claims to allegedly looted cultural property. For example, in the New York case of *The Republic of Croatia v. The Marquess of Northampton 1987 Settlement*,<sup>86</sup> Croatia and Hungary attempted to argue that the Sevso Treasure—“a fourteen-piece collection of fourth-century Roman silver and the copper cauldron in which the [silver] is believed to have been stored in antiquity”—had been stolen from one of them and sold to Lord Northampton shortly after it was illegally excavated.<sup>87</sup> The jury refused to find that either party met its obligation to prove by a preponderance of the evidence that the Sevso Treasure had originated in its lands.<sup>88</sup> Both parties failed to meet this burden because neither had any direct evidence or eyewitness testimony placing the Treasure’s discovery within their borders.<sup>89</sup> Instead they had to rely on questionable circumstantial evidence like witnesses remembering seeing something that “looked like” the treasure (though when pressed they remembered what they saw being smaller than the Sevso Treasure),<sup>90</sup> alleged indentations in the ground made by the Treasure’s cauldron (which the court eventually learned had been made by a wine cask),<sup>91</sup> and the fact that because Rome once occupied Croatia and Hungary, it only made sense that the Treasure must have come from one of them.<sup>92</sup> Matters were further complicated for Croatia and Hungary when the

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and taken the krater. Randy Kennedy, Hugh Eakin & Elisabetta Povoledo, *The Met, Ending 30-Year Stance, Is Set to Yield Prized Vase to Italy*, N.Y. TIMES, Feb. 3, 2006, at A6. Based on the records the Swiss collected from Medici’s warehouse, the Italians learned that he had sold the krater to an American antiquities dealer named Robert Hecht, who lived and worked in Rome. WAXMAN, *supra* note 21, at 192. After raiding Hecht’s apartment, discovering a memoir detailing the krater’s questionable history, and learning that Hecht had sold the krater to the Met, the Italian Ministry of Culture asked the Met to return the krater. *Id.* at 197. At first, the Met refused. *Id.* However, once Italy threatened criminal proceedings under the NSPA, the Met agreed to return the krater, which it considered to be one of its most prized possessions. *Id.*

<sup>86</sup> See *Republic of Croatia v. Trustee of the Marquess of Northampton 1987 Settlement*, 610 N.Y.S.2d 263 (N.Y. App. Div. 1994), *cert. denied*, 84 N.Y.2d 805 (N.Y. 1994).

<sup>87</sup> Kurzweil, Gagon & De Walden, *supra* note 28, at 83.

<sup>88</sup> *Marquess of Northampton*, 610 N.Y.S.2d at 264–65.

<sup>89</sup> See Kurzweil, Gagon & De Walden, *supra* note 28, at 87–91.

<sup>90</sup> *Id.* at 88–89.

<sup>91</sup> *Id.* at 87.

<sup>92</sup> *Id.*

trial court excluded their scientific evidence (soil samples taken from the alleged Treasure find sites and from the cauldron itself) because it was mishandled<sup>93</sup> and their expert testimony because it was too speculative.<sup>94</sup>

This case highlights how it can be difficult for source nations to prove that alleged pieces of their cultural property were stolen, especially when they have only circumstantial evidence upon which they can rely. It also highlights that repatriation litigation in the United States is time-consuming<sup>95</sup> and scientifically and financially challenging for source nations who cannot compete with American financial resources. Source nations have little choice but to abandon the litigation-based pursuit of everything but the most precious of their alleged cultural property when faced with (1) the resources of wealthy American collectors and museums armed with expert opinions and scientific data, (2) pressing domestic problems, and (3) marginal UNESCO Convention protection.

### *B. Cultural Property Regulation in the United Kingdom*

The United Kingdom has not ratified the UNESCO Convention.<sup>96</sup> In its place, the U.K. maintains a complicated import regulation system. Under § 1 of the Import, Export and Customs Powers (Defence) Act 1939, the British Board of Trade:

may by order make such provisions as [it thinks] expedient for prohibiting or regulating, in all cases or any specified classes of cases . . . the importation into, or exportation from, the United Kingdom or any specified part thereof . . . of all goods or goods of any specified description.<sup>97</sup>

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<sup>93</sup> *Id.*

<sup>94</sup> *Republic of Croatia v. Trustee of the Marquess of Northampton 1987 Settlement*, 610 N.Y.S.2d 263, at 265 (N.Y. App. Div. 1994).

<sup>95</sup> Kurzweil, Gagon & De Walden, *supra* note 28, at 92 (litigation lasted for three years, with Hungary pressing its claims in the media for years afterwards).

<sup>96</sup> States Parties to the Convention of the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, *supra* note 16.

<sup>97</sup> The Import and Export Control Act, 1939, 2 & 3 Geo. 6, c. 69, § 1 (Eng.), available at [http://www.opsi.gov.uk/RevisedStatutes/Acts/ukpga/1939/cukpga\\_19390069\\_en\\_1](http://www.opsi.gov.uk/RevisedStatutes/Acts/ukpga/1939/cukpga_19390069_en_1).

## MEDIATION'S POTENTIAL ROLE IN CULTURAL PROPERTY DISPUTES

Under this authorization, the British Board of Trade has ordered that all goods entering Britain carry an import license.<sup>98</sup> Currently, the Department of Trade and Industry Grants has declared “an Open General Import Licence which permits the import of all goods from all sources unless specifically excluded.”<sup>99</sup> Because no item of cultural property has been specifically excluded by the Board or the Department of Trade and Industry Grants, all cultural property may enter the U.K. unless either the Theft Act 1968 or the Dealing in Cultural Objects (Offences) Act 2003 reaches it.<sup>100</sup>

The Theft Act 1968 functions similarly to the U.S.’s NSPA. The Theft Act makes it illegal for people in the U.K. to dishonestly handle goods (i.e., do anything other than turn them over to the police) that they either know or should know are stolen,<sup>101</sup> regardless of where that theft took place and what nation defines the theft as a theft.<sup>102</sup> On its face, this Act permits source nations to reclaim looted cultural property exported to Britain. However, there is a gaping hole in the Act: it applies only to stolen property handled “for the benefit of another person.”<sup>103</sup> This means that under the Theft Act 1968, unless the British police capture a piece of stolen cultural property while it is still in the hands of middlemen, source nations have no legal right to reacquire their cultural property from Britain.<sup>104</sup> Because this creates an ethical dilemma, British Parliament passed the remedial Dealing in Cultural Objects (Offences) Act 2003.<sup>105</sup>

The Dealing in Cultural Objects (Offences) Act 2003 reads that “[a] person is guilty of an offence if he dishonestly deals in a cultural object that is tainted, knowing or believing that the object is tainted.”<sup>106</sup> Under the Act, a “cultural object” is “an object of historical, architectural or archaeological interest.”<sup>107</sup> An object is “tainted” if it was either excavated illegally or removed from a building or structure of historic import of which it was a structural part.<sup>108</sup> To be charged under the Act, a person has to acquire,

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<sup>98</sup> MACKENZIE, *supra* note 35, at 69.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> Theft Act, 1968, c. 60, § 22(1) (Eng.).

<sup>102</sup> *Id.* § 24(1).

<sup>103</sup> *Id.* § 22(1).

<sup>104</sup> MACKENZIE, *supra* note 35, at 70.

<sup>105</sup> *Id.* at 71.

<sup>106</sup> Dealing in Cultural Objects (Offences) Act, 2003, c. 27, § 1(1) (Eng.).

<sup>107</sup> *Id.* § 2(1).

<sup>108</sup> *Id.* § 2(2).

dispose of, import, or export a cultural object that the person knows or believes is tainted.<sup>109</sup> It does not matter if the person knows that the object is a cultural object.<sup>110</sup>

Because both the Dealing in Cultural Objects (Offences) Act 2003 and the Theft Act 1968 apply to all stolen cultural objects regardless of their origin, it appears that source nations should be able to pursue pieces of their cultural property exported illegally to Britain.<sup>111</sup> However, there are significant problems with the U.K.'s system, even with the stopgap measures employed by the Dealing in Cultural Objects (Offences) Act 2003. First, as in the U.S., it is very difficult for a source nation to prove that an object was taken from it.<sup>112</sup> The evidence is often insubstantial or circumstantial. Thus, even if the British police capture a cultural object within the confines of either Act, there is no guarantee that a source nation will be able to prove that the object originated within its borders. Second, even though the Dealing in Cultural Objects (Offences) Act 2003 overcomes the Theft Act 1968's application only to those parties handling stolen goods for the benefit of a third-party by applying to any person who "deals in a cultural object," the Act still requires that source nations prove that the alleged perpetrators (1) actually knew that a cultural object was tainted when they dealt it and (2) that they somehow dealt "dishonestly" with it.<sup>113</sup> Neither of these is easy to prove. Because of these difficulties, the Dealing in Cultural Objects (Offences) Act 2003 has been used so infrequently that scholars and British officials now consider it largely symbolic.<sup>114</sup> Source nations therefore possess little real hope of repatriating anything from the U.K. unless they can clearly prove it was stolen from their territories counter to their patrimony laws and was dealt with dishonestly.

### *C. Cultural Property Regulation in Japan*

Japan accepted the UNESCO Convention in 2002.<sup>115</sup> However, much like the U.S., the law Japan enacted to accept the Convention largely strips it

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<sup>109</sup> *Id.* § 3.

<sup>110</sup> *Id.* § 1(2).

<sup>111</sup> *Id.* § 2(3).

<sup>112</sup> MACKENZIE, *supra* note 35, at 81.

<sup>113</sup> Dealing in Cultural Objects (Offences) Act, *supra* note 106, § 1(1).

<sup>114</sup> MACKENZIE, *supra* note 35, at 71.

<sup>115</sup> States Parties to the Convention of the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, *supra* note 16.

## MEDIATION'S POTENTIAL ROLE IN CULTURAL PROPERTY DISPUTES

of any real obligations.<sup>116</sup> Even though Japan's Law Concerning Control on Illicit Export and Import of Cultural Property permits States Parties to the UNESCO Convention to designate whatever materials they want as their own cultural property,<sup>117</sup> Japanese repatriation protections only extend to that "cultural property [which] has been stolen from an institution stipulated in Article 7(b)(1) of the Convention."<sup>118</sup> Thus, unless a source nation can prove that a piece of its cultural property which has ended up in Japan came from one of its museums or some other "religious or public monument," the Japanese will not repatriate it.<sup>119</sup> This rule applies to an object even if a source nation has eyewitness or scientific and expert testimony proving that it was illegally excavated and sold from the source nation's borders.

Further complicating matters is the fact that Japan will not enforce its limited version of the UNESCO Convention unless a source nation's Minister of Foreign Affairs (or some governmental equivalent) contacts Japan's Minister of Education, Culture, Sports, Science and Technology with news of the theft before the stolen cultural property reaches Japan.<sup>120</sup> If this

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<sup>116</sup> See PATRICK J. O'KEEFE, COMMENTARY ON THE 1970 UNESCO CONVENTION 125 (2d ed. 2007).

<sup>117</sup> Law Concerning Control on Illicit Export and Import of Cultural Property, Law No. 81 of 2002, art. 2(1), *available at* <http://www.bunka.go.jp/english/law.html>.

<sup>118</sup> Law Concerning Control on Illicit Export and Import of Cultural Property (2002), art. 3(1). Article 7(b)(i) of the UNESCO Convention declares that States parties will "prohibit the import of cultural property stolen from a museum or a religious or secular public monument or similar institution in another State Party to this Convention . . . provided that such property is documented as appertaining to the inventory of that institution." UNESCO Convention, *supra* note 12, art. 7(b)(i). The interplay of article 7(b)(i) of the UNESCO Convention and article 3(1) of the Japanese Law Concerning Control on Illicit Export and Import of Cultural Property presents an interesting and unanswered question: will the Japanese law only apply to those objects at a museum or public monument which have been "documented as appertaining to the inventory of that institution"? O'KEEFE, *supra* note 116, at 126.

<sup>119</sup> O'KEEFE, *supra* note 116, at 125.

<sup>120</sup> Law Concerning Control on Illicit Export and Import of Cultural Property (2002), art. 5(1). It is important to note that the Japanese will not respect notifications from any source nation that do not come from the source nation's government. O'KEEFE, *supra* note 117, at 126. Thus, if a museum in Albania realizes that a thief has stolen a Greek figurine from its collection, it cannot directly contact the Japanese government to ask for its assistance. *Id.* Instead, it must ask the Albanian government to intercede on its behalf. *Id.* This is problematic because museums of many source nations lack the data infrastructure to account for all of their pieces. *Id.* Thus, it often takes them a great deal of time to identify missing pieces—enough time for a piece to travel to Japan and find safe harbor within its lenient cultural property regime. *Id.*

notification occurs in a timely fashion, there is still no guarantee that the Japanese will return the cultural property in question because the ultimate decision on repatriation resides with two ministers in the Japanese government.<sup>121</sup> If they decide that it is not in Japan's best interest to honor the source nation's notification, nothing in Japanese law can compel Japan to do so.<sup>122</sup> This situation, like that of the U.S. and U.K., makes it very difficult to repatriate cultural property from Japan.

#### *D. Cultural Property Regulation in Other Market States*

The cultural property laws of two other States merit brief examination. Switzerland ratified its version of the UNESCO Convention on January 3, 2004,<sup>123</sup> when it enacted the Loi fédérale sur le transfert international des biens culturels (CPTA) and the Ordonnance sur le transfert international des biens culturels (OTBC).<sup>124</sup> According to Article 7 of the CPTA, the Swiss Federal Council may enter into bilateral agreements with source nations in order to protect "the cultural and foreign policy interests of Switzerland and to ensure the protection of cultural heritage in general."<sup>125</sup> In order to achieve a bilateral agreement with Switzerland concerning its cultural property, a source nation must first convince Switzerland that the cultural property it seeks to protect is "of significant importance to [its] heritage."<sup>126</sup> Second, the cultural property which the source nation wishes to subject to a bilateral agreement must already "be subject to export control . . . designed to protect [the source nation's] cultural property."<sup>127</sup> Finally, the source nation must be willing to "agree to provide reciprocity" to Switzerland if any Swiss cultural property were to ever illegally leave Swiss borders for the source nation.<sup>128</sup> If Switzerland grants a source nation a bilateral agreement, it officially

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<sup>121</sup> These ministers are the Minister of Education, Culture, Sports, Science and Technology and the Minister of Economy, Trade and Industry. Law Concerning Control on Illicit Export and Import of Cultural Property (2002), art. 3(3).

<sup>122</sup> O'KEEFE, *supra* note 116, at 126.

<sup>123</sup> States Parties to the Convention of the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, *supra* note 16.

<sup>124</sup> O'KEEFE, *supra* note 116, at 129. O'Keefe reproduced the CPTA in Appendix VII on pages 204–11. The OTBC can be found online at [http://www.admin.ch/ch/f/rs/444\\_11/index.html](http://www.admin.ch/ch/f/rs/444_11/index.html) (last visited Feb. 16, 2010).

<sup>125</sup> O'KEEFE, *supra* note 116, at 130.

<sup>126</sup> *Id.* at 131.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

## MEDIATION'S POTENTIAL ROLE IN CULTURAL PROPERTY DISPUTES

contracts to fine or imprison anyone who imports the materials covered by the agreement and return whatever it confiscates.<sup>129</sup>

If a source nation manages to acquire a bilateral agreement from the Swiss, in order to invoke the protection of the agreement it must “prove that [an] object was unlawfully imported into Switzerland and that it was of significant importance to its own cultural heritage.”<sup>130</sup> These are two equally tall and vague tasks that leave source nations at the mercy of Swiss judges who are under no obligation to acknowledge any foreign state’s definition of its own cultural property.<sup>131</sup> Furthermore, if a source nation succeeds in proving both of these requirements, it is nonetheless obligated to pay “all the costs associated with protection, preservation, and return of an object,” and, if the object’s Swiss purchaser bought it in good faith, purchaser compensation.<sup>132</sup> If a source nation cannot afford to cover these costs, the Swiss will pay either 50 percent of the repatriation process’s total costs or 50,000 francs.<sup>133</sup>

The second state, Australia, has yet to ratify the UNESCO Convention,<sup>134</sup> although its Protection of Movable Cultural Heritage Act (1986) (PMCHA) more closely aligns with the Convention’s precepts than any of the other market nation cultural property regimes addressed in this note.<sup>135</sup> According to § 14(1) of the Act, “where (a) a protected object from a foreign country has been exported from that country; (b) the export was prohibited by law of that country relating to cultural property; and (c) the object is imported [into Australia]; the object is liable to forfeiture.”<sup>136</sup> A “protected object” is an object which forms “part of the movable cultural heritage of a foreign country.”<sup>137</sup>

Despite its encouraging language, the PMCHA ultimately fails to protect source nations. Even though the Act grants wide powers of search, seizure,

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<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 132

<sup>131</sup> O’KEEFE, *supra* note 116, at 132.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> States Parties to the Convention of the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, *supra* note 16.

<sup>135</sup> MACKENZIE, *supra* note 35, at 73–74. The Protection of Movable Cultural Heritage Act (1986) can be found online at [http://www.austlii.edu.au/au/legis/cth/consol\\_act/pomcha1986393/](http://www.austlii.edu.au/au/legis/cth/consol_act/pomcha1986393/) (last visited Sept. 11, 2010) [hereinafter PMCHA].

<sup>136</sup> PMCHA § 14(1).

<sup>137</sup> *Id.* § 3(1).

and arrest to Australian police and customs agents,<sup>138</sup> it has been widely observed that they lack the training and education necessary to identify relevant pieces of cultural property.<sup>139</sup> This is problematic, because it does not appear that source nations have any legal recourse under Australian law by which they may repatriate their illegally exported cultural property once it passes through customs.<sup>140</sup>

### III. THE BENEFITS OF MEDIATING INTERNATIONAL CULTURAL PROPERTY DISPUTES

In light of the failures of international cultural property regimes, mediation is the best means by which states can equitably repatriate looted antiquities, artwork, and other culturally significant objects.<sup>141</sup> As Part II of this note shows, market nation legal regimes do not accord source nations the opportunity to fairly reclaim property discovered within and shipped from their borders.<sup>142</sup> This part outlines how mediation can help source nations fairly accomplish this task by (a) briefly defining mediation and (b) comparing and contrasting it with other internationally recognized mechanisms of dispute resolution. This part shows that mediation's traits, for example, its production of mutually beneficial settlements without the application of confusing market nation law,<sup>143</sup> uniquely position it to address

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<sup>138</sup> See *id.* §§ 27–36.

<sup>139</sup> MACKENZIE, *supra* note 35, at 74.

<sup>140</sup> See PMCHA § 14(1).

<sup>141</sup> See Hans Das, *Claims for Looted Cultural Assets: Is There a Need for Specialized Rules of Evidence?*, in RESOLUTION OF CULTURAL PROPERTY DISPUTES: PAPERS EMANATING FROM THE SEVENTH PCA INTERNATIONAL LAW SEMINAR 193, 194–95 (Int'l Bureau of the Permanent Ct. of Arb. ed., Kluwer Law Int'l 2004).

<sup>142</sup> The difficult position in which source nations find themselves in regard to resources is no better exemplified than by the example of Turkey. ISABELLE FELLRATH GAZZINI, CULTURAL PROPERTY DISPUTES: THE ROLE OF ARBITRATION IN RESOLVING NON-CONTRACTUAL DISPUTES 58 (2004). Gazzini points out the absurdity of Turkey expecting to properly protect its cultural property interests in the courts of market nations when its Department of Antiquities (the governmental department responsible for both pursuing cultural property claims in foreign courts and the excavation and preservation of Turkey's archaeological heritage) is granted a paltry \$5 million a year to cover *all* of its costs. *Id.*

<sup>143</sup> See MARY ELLEN O'CONNELL, INTERNATIONAL DISPUTE RESOLUTION: CASES AND MATERIALS 49 (2006).



## MEDIATION'S POTENTIAL ROLE IN CULTURAL PROPERTY DISPUTES

international cultural property disputes in a world where market nations hold most of the power.

### A. *The Basic Elements of Mediation*

Mediation is a process by which third parties—which could include “private individuals, government officials, religious figures, regional or international organizations, *ad hoc* groups, small states, [or] large states”<sup>144</sup>—facilitate peaceful negotiations between disputants who have voluntarily agreed to meet and settle their differences in a consensual and mutually beneficial manner.<sup>145</sup> It is a flexible process defined entirely by the parties themselves in that it adapts to their individual needs and circumstances<sup>146</sup> without necessitating the application of any procedural or substantive law.<sup>147</sup> Thus, because formal rules do not constrain parties, they may negotiate however they want to achieve whatever type of settlement they like best, regardless of its creativity or subject matter.<sup>148</sup>

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<sup>144</sup> Jacob Bercovitch, *The Structure and Diversity of Mediation in International Relations*, in *MEDIATION IN INTERNATIONAL RELATIONS: MULTIPLE APPROACHES TO CONFLICT RESOLUTION* 1, 8 (Jacob Bercovitch & Jeffrey Z. Rubin eds., 1992).

<sup>145</sup> See *id.* at 7 (mediation is “a process of conflict management, related to but distinct from the [disputants’] own efforts, where the disputing parties or their representatives seek the assistance, or accept an offer of help, from an individual, group, state, or organization to change, affect or influence their perceptions or behavior, without resorting to physical force or invoking the authority of the law”); Anna Spain, *Using International Dispute Resolution to Address the Compliance Question in International Law*, 40 *GEO. J. INT’L L.* 807, 826 (2009) (mediation is “a voluntary and non-coercive process whereby an impartial third party helps states reach an agreement and repair relations”); CHRISTOPHER W. MOORE, *THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT* 8 (1996) (“Mediation is an extension or elaboration of the negotiation process that involves the intervention of an acceptable third party who has limited or no authoritative decision-making power. This person assists the principal parties in voluntarily reaching a mutually acceptable settlement of the issues in dispute.”).

<sup>146</sup> Bercovitch, *supra* note 144, at 3–4.

<sup>147</sup> GAZZINI, *supra* note 142, at 62; see also Donald L. Carper & John B. LaRocco, *What Parties Might Be Giving Up and Gaining When Deciding Not to Litigate: A Comparison of Litigation, Arbitration and Mediation*, 63 *DISP. RESOL. J.* 48, 56–57 (2008).

<sup>148</sup> See Norman Palmer, *Litigation: The Best Remedy?*, in *RESOLUTION OF CULTURAL PROPERTY DISPUTES: PAPERS EMANATING FROM THE SEVENTH PCA INTERNATIONAL LAW SEMINAR* 265, 280 (Int’l Bureau of the Permanent Ct. of Arb. ed., Kluwer Law Int’l 2004). As Palmer puts it, mediators are not bound to advocate traditional judicial remedies unless the parties so request. *Id.* at 270–71. Thus they can

Mediation takes many forms. It can consist of (1) straight party-to-party talks (i.e., bilateral or multilateral negotiations) where the mediator facilitates discussion and clarifies party statements;<sup>149</sup> (2) shuttle negotiations in which parties remain separated during negotiations and the mediator shuttles communications, proposals, and draft settlement agreements between them;<sup>150</sup> or (3) some combination of the two. The mediator's role can also vary greatly in scope and degree. Even though mediator neutrality and impartiality are fundamental to mediation,<sup>151</sup> disputants can agree to limit a mediator's duties to everything from (a) passing notes between the parties and refereeing negotiations to (b) interpreting party communications and offering his or her own suggestions as to how to settle the parties' dispute, or settle any misunderstandings that arise during negotiations.<sup>152</sup>

The ultimate goal of mediation is to reach a mutually beneficial agreement based upon an understanding of each party's interests.<sup>153</sup> The idea is that parties (often referred to as stakeholders) base their claims on underlying interests.<sup>154</sup> For example, if a source nation enters into mediation demanding that a market nation return a relatively common piece of ancient pottery, it is most likely making its demand not because it actually wants the piece of pottery back (it already has dozens of comparable pieces), but because it feels that the market nation's refusal to turn over the piece has

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encourage the disputants to find creative solutions to their problems. An example of such creativity comes from a mediated dispute settlement involving the display of Jan Griffer the Elder's *View of Hampton Court Palace* by the Tate Gallery in London. *Id.* at 273. The painting ended up in the Tate's collection after the Nazis confiscated it from a Jewish family in World War II and a disreputable dealer sold it to the Tate. *Id.* When the family discovered it hanging in London, they demanded its return. *Id.* Entering into mediation, the parties agreed that in exchange for the Tate continuing to display the painting, the museum would (1) provide the family with a nominal *ex gratia* payment and (2) hang a plaque next to the painting recognizing the suffering and cruelties visited upon victims of the Holocaust. *Id.* This creative, mediated solution made both parties happy and saved the Tate Gallery a public flogging for illegally possessing Holocaust art. *Id.*

<sup>149</sup> MOORE, *supra* note 145, at 59, 343.

<sup>150</sup> Michael L. Poirier Elliot, *The Role of Facilitators, Mediators, and Other Consensus Building Practitioners*, in THE CONSENSUS BUILDING HANDBOOK, A COMPREHENSIVE GUIDE TO REACHING AGREEMENT 199, 228–29 (Lawrence Susskind, Sarah McKearnan & Jennifer Thomas-Larmer eds., 1999).

<sup>151</sup> *Id.* at 218.

<sup>152</sup> Bercovitch, *supra* note 144, at 15; see also MOORE, *supra* note 145, at 99.

<sup>153</sup> MOORE, *supra* note 145, at 71. According to Moore, “[i]nterests are specific conditions (or gains) that a party must obtain for an acceptable settlement to occur.” *Id.*

<sup>154</sup> *Id.* at 71.

## MEDIATION'S POTENTIAL ROLE IN CULTURAL PROPERTY DISPUTES

violated its sovereignty, i.e., its ability to control its own property and borders. Proponents of mediation suggest that it is only with an understanding of such underlying interests that parties can negotiate to truly and creatively resolve their differences.<sup>155</sup>

To further clarify mediation and to prove why it is the best means by which parties may settle their cultural property disputes, the next subsection compares it with a few other internationally recognized dispute resolution mechanisms.

### *B. Comparing Mediation with Negotiation, Arbitration, and Litigation*

Mediation is one of a number of internationally recognized dispute resolution mechanisms. Others include negotiation, arbitration, and litigation.<sup>156</sup> Negotiation is "direct communication [between parties] to resolve an issue or dispute."<sup>157</sup> It requires nothing more than the presence of the disputants or their representatives, a minimal number of mutually agreed-upon procedural understandings that facilitate effective discussion, and an interparty willingness to communicate.<sup>158</sup> Arbitration is a consent-based, formal, litigation-like "process where parties submit decisionmaking authority to [arbitrators] who make binding determinations about rights and assets based on legal and factual merits of a dispute" in a non-litigation

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<sup>155</sup> Spain, *supra* note 145, at 836.

<sup>156</sup> See, e.g., U.N. Charter, art. 33, para. 1, available at <http://treaties.un.org/doc/Publication/CTC/uncharter.pdf>. According to the U.N. Charter, there are two other internationally recognized dispute resolution mechanisms: inquiry and conciliation. *Id.* Inquiry assumes that disputants need only a third party determination of a material, contentious fact or set of facts to negotiate a settlement by themselves. O'CONNELL, *supra* note 144, at 69. Conciliation is much like inquiry, except that instead of solely settling the factual dispute, the third party doing the fact-finding drafts a non-binding opinion offering its recommendation as to how the disputants might settle their differences. *Id.* Unlike negotiation and mediation, two highly informal procedures, inquiry and conciliation practitioners "conduct themselves quite like an arbitral tribunal, hearing witness testimony, reviewing documents, and making . . . inspections" if necessary. *Id.* This subsection does not comparatively assess inquiry and conciliation with the other dispute resolution mechanisms mentioned because they are primarily concerned with fact-finding to the exclusion of the underlying dispute. Thus, their relevance extends only so far because parties will often use them merely as a means to augment negotiation.

<sup>157</sup> O'CONNELL, *supra* note 143, at 25.

<sup>158</sup> *Id.*

setting.<sup>159</sup> Arbitration leaves every decision, other than the outcome, to the parties—e.g., the identities of the arbitrators, the procedural and substantive law governing the arbitration, and the location of the arbitration proceedings.<sup>160</sup> Finally, litigation is “the act or process of carrying out a lawsuit” before a court.<sup>161</sup> It is not consensual; one party can force it upon another party.<sup>162</sup>

The following subsections compare and contrast mediation with negotiation, arbitration, and litigation in order to clarify why mediation is the superior dispute resolution mechanism by which parties can pursue their international cultural property claims.<sup>163</sup>

### 1. Mediation Respects State Sovereignty

Mediation is uniquely positioned to respect state sovereignty.<sup>164</sup> Respecting state sovereignty in international cultural property disputes is crucial because it is the lack of such respect in documents like the UNESCO Convention that has forced market nations to enact cultural property regimes

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<sup>159</sup> Spain, *supra* note 145, at 828; *see also* Winston Stromberg, *Avoiding the Full Court Press: International Commercial Arbitration and Other Global Alternative Dispute Resolution Processes*, 40 LOY. L.A. L. REV. 1337, 1341 (2007) (“Arbitration is a private, nongovernmental process, fashioned by contract, which provides for binding resolution of a dispute through the decision of one or more private individuals selected by the disputants.”).

<sup>160</sup> O’CONNELL, *supra* note 143, at 97; *see also* GAZZINI, *supra* note 142, at 100.

<sup>161</sup> WEBSTER’S NEW WORLD DICTIONARY 790 (3d ed. 1991).

<sup>162</sup> Palmer, *supra* note 148, at 279.

<sup>163</sup> This subsection is not meant to perfectly log all the differences between mediation and negotiation, arbitration, and litigation. Instead, it is designed to provide a brief overview of the major differences which disputants will likely consider when determining which mechanism they should use to pursue international cultural property claims. It is also important to note that not every part of this subsection deals with negotiation. This is the case because mediation is very similar to negotiation short of mediation’s use of a third party facilitator. Thus, because mediation and negotiation share so many of the same benefits, this subsection deals only with negotiation when its deficiencies render it inferior to mediation. Finally, this subsection discusses litigation because even though Part II makes a strong implied argument against using litigation to resolve cultural property disputes, some parties might hope that the international community will someday build new, more equitable, litigation-based cultural property regimes by which they can reacquire looted objects. This part partially exists to suggest that this would be a mistake for numerous reasons relating to litigation’s deficiencies.

<sup>164</sup> Palmer, *supra* note 148, at 280; Carper & LaRocco, *supra* note 147, at 52.

## MEDIATION'S POTENTIAL ROLE IN CULTURAL PROPERTY DISPUTES

which strip source nations of their ability to equitably pursue looted cultural property.<sup>165</sup> Market nations like the U.S., the U.K., Japan, Switzerland, and Australia dislike the UNESCO Convention because it attempts (1) to place the decision as to what constitutes illegally acquired cultural property into source nation hands<sup>166</sup> and (2) to force market nations to return objects that enter their borders that source nations have labeled their cultural property almost without question.<sup>167</sup> If these two allegations are true, then the UNESCO Convention might actually violate market nation sovereignty by allowing source nations to freely reach into market nations' borders and repatriate whatever they wish.

Mediation addresses this fear in ways that negotiation, arbitration, and litigation cannot. Because mediation does not require the application of any particular substantive law (such as the UNESCO Convention) unless the parties agree, market nations can begin mediation with the understanding that no law will force them to do anything to which they do not agree.<sup>168</sup> This is quite different than arbitration or litigation because these mechanisms must apply to some type of binding substantive law.<sup>169</sup> Even though negotiation does not require the application of any substantive law, it too falls short of mediation's potential effectiveness because it has no third party to facilitate

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<sup>165</sup> See Bercovitch, *supra* note 144, at 2; see also GAZZINI, *supra* note 142, at 56 (discussing that states readily invoke "sovereign immunity" when sued in domestic courts).

<sup>166</sup> UNESCO Convention, *supra* note 12, art. 13(d) (States Parties to the Convention undertake to "recognize the inalienable right of each State Party to this Convention to classify and declare certain cultural property as inalienable which should therefore *ipso facto* not be exported, and to facilitate recovery of such property by the State concerned in cases where it has been exported.").

<sup>167</sup> *Id.* at art. 13(b) (States Parties to the Convention undertake to "ensure that their competent services cooperate in facilitating the earliest possible restitution of illicitly exported cultural property to its rightful owner.").

<sup>168</sup> See Carper & LaRocco, *supra* note 147, at 57.

<sup>169</sup> See Palmer, *supra* note 148, at 279–80. It is important to note that arbitration, unlike litigation, allows disputant-stakeholders to mutually agree on what substantive law will apply to the resolution of their dispute. *Id.* at 279. However, unlike mediation in which parties negotiate a mutually beneficial settlement to their dispute, arbitration almost always has a winner and a loser according to the substantive law invoked by the parties and interpreted by the arbitration panel. Don Peters, *Can We Talk? Overcoming Barriers to Mediating Private Transborder Commercial Disputes in the Americas*, 41 VAND. J. TRANSNAT'L L. 1251, 1258–59 (2008).

talks. Therefore, negotiation is much more likely to dissolve when one party refuses to bend.<sup>170</sup>

## 2. Mediation Requires Mutual Consent

Because mediation is a consensual process with built-in compliance measures that do not infringe upon perceptions of state sovereignty, it encourages parties in international cultural property disputes to directly settle with each other and comply with any agreement at which they arrive better than negotiation, arbitration, or litigation.<sup>171</sup> Mediation is consensual in two ways: (1) disputants voluntarily enter into mediation and (2) in order for a settlement to bind, disputants must voluntarily agree to mutual enforcement.<sup>172</sup> This consensual nature encourages nations to respect state sovereignty by leaving dispute resolution entirely up to the goodwill of the parties themselves.<sup>173</sup> Furthermore, because parties design their own settlements, the likelihood of compliance is relatively high; when parties negotiate in good faith, any mediated agreement should address the interests of both parties.<sup>174</sup>

Arbitration and litigation cannot make similar claims. Even though arbitration and mediation both require each party's consent to begin, there is no guarantee that an arbitrated outcome will please all the disputants because arbitration's results are binding and determined independently by a third party.<sup>175</sup> When an arbitrated result does not please one of the disputants, it is incredibly difficult and costly to force them to comply with an arbitration award,<sup>176</sup> unless the disputants ratified some arbitration enforcement treaty

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<sup>170</sup> See MOORE, *supra* note 145, at 16–18.

<sup>171</sup> See Carper & LaRocco, *supra* note 147, at 50. According to Gazzini, “[P]rivate ordering obtained through . . . mediation focuses on the identification of the parties’ respective interests, and the accommodation and conciliation of their respective claims through a mutually agreeable solution. There is no constraint of a strict application of the law following an adversarial procedure . . . nor is there any requirement to respect the coherency of a particular case law. [This in turn inspires] a high rate of spontaneous compliance.” GAZZINI, *supra* note 142, at 62 (emphasis added).

<sup>172</sup> Spain, *supra* note 145, at 826.

<sup>173</sup> See Bercovitch, *supra* note 144, at 23.

<sup>174</sup> MOORE, *supra* note 145, at 72–73.

<sup>175</sup> Carper & LaRocco, *supra* note 147, at 54.

<sup>176</sup> GAZZINI, *supra* note 142, at 87. This is true even though *pacta sunt servanda* renders an arbitral award an internationally binding contract. *Id.* When parties agree to

## MEDIATION'S POTENTIAL ROLE IN CULTURAL PROPERTY DISPUTES

such as the 1958 Convention on the Recognition and Enforcement of Foreign Arbitrary Awards (New York Convention).<sup>177</sup>

Litigation also suffers from serious deficiencies, the most obvious of which is its mandatory nature. Unlike other dispute resolution mechanisms, if a court has jurisdiction over one party's claim, that party can force a defendant into court where judges applying that court's substantive and procedural law will resolve the claim and apply traditional, non-interest based relief like damages or injunctions.<sup>178</sup> While litigation offers finality and a relatively easy means for the enforcement of judgments, its non-consensual nature destroys party relationships and undermines creative problem-solving that could ultimately lead to future resolutions and mutually benefit all of the parties involved.<sup>179</sup>

While negotiation only proceeds with party consent, its narrowness limits its usefulness in cultural property disputes. Unlike mediation, where the mediator is usually a person or party with enough international clout or interparty standing to personally monitor and encourage the enforcement of any settlements reached,<sup>180</sup> negotiation relies entirely upon the goodwill of the parties for enforcement. Since negotiation has absolutely no compliance mechanisms in place, settlements negotiated without a mediator are extremely susceptible to renunciation.

### *3. Mediation Identifies Party Interests and Shapes Settlements Accordingly*

Unlike negotiation, arbitration, and litigation, mediation empowers parties to look beyond their original claims to the interests that underlie them.<sup>181</sup> As mentioned above, mediation asks disputants to identify their real motivations and to cooperate to come to mutually beneficial agreements

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enter into arbitration, they usually contract to abide by the decision of the arbitral tribunal. *Id.* at 29–30.

<sup>177</sup> *Id.* at 79. According to the New York Convention, a state that ratifies the Convention “must recognize and enforce arbitral awards entered in” other states unless it has given international notice that it will only enforce awards granted by tribunals seated or convened in other ratifying states. Stromberg, *supra* note 159, at 1344.

<sup>178</sup> Carper & LaRocco, *supra* note 147, at 53–54; Palmer, *supra* note 148, at 268.

<sup>179</sup> Carper & LaRocco, *supra* note 147, at 53–54.

<sup>180</sup> Bercovitch, *supra* note 144, at 9.

<sup>181</sup> Spain, *supra* note 145, at 836.

which address each disputant-stakeholder's most critical interests.<sup>182</sup> This practice is the essence of consensus-building.<sup>183</sup>

Negotiation fails to accomplish consensus building because, without the presence of a mediator, disputants have little impetus to discuss their interests in an honest and cooperative manner. Instead, it is likely that they will rely on whatever sources of coercive power they have to attempt to accomplish what they want.<sup>184</sup> In the international cultural property world, this sometimes leads to a market nation forcing a source nation to take it to the market nation's courts where the resource-poor source country will have the almost impossible burden of proving that the object in question was stolen.

Arbitration also often fails to build consensus because, while it is a consensual process in which the disputants have chosen the law that the arbitrators will apply to their dispute, the ultimate resolution is left in the hands of the arbitrators.<sup>185</sup> They can fashion their resolution however they wish within the bounds of their grants of power, ignoring or integrating as many of the disputants' interests as they want. Thus, there is no guarantee that an arbitrated decision will actually please each disputant.

Finally, litigation also fails to build consensus because litigation is an adversarial process.<sup>186</sup> Parties argue against each other over either the interpretation of facts or the applicability of a set of laws. There is often little room for negotiation and no room for a creative settlement or considerations of future relationships. One party wins and takes home the spoils, and the other loses and gets nothing.

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<sup>182</sup> MOORE, *supra* note 145, at 72–73.

<sup>183</sup> Lawrence Susskind, *An Alternative to Robert's Rules of Order for Groups, Organizations, and Ad Hoc Assemblies That Want to Operate by Consensus*, in THE CONSENSUS BUILDING HANDBOOK: A COMPREHENSIVE GUIDE TO REACHING AGREEMENT 3, 6 (Lawrence Susskind, Sarah McKearnan & Jennifer Thomas-Larmer eds., 1999). According to Susskind, consensus-building is "a process of seeking unanimous agreement. It involves a good-faith effort to meet the interests of all stakeholders. Consensus has been reached when everyone agrees they can live with whatever is proposed after every effort has been made to meet the interests of all stakeholding parties." *Id.*

<sup>184</sup> Spain, *supra* note 145, at 814.

<sup>185</sup> O'CONNELL, *supra* note 143, at 97.

<sup>186</sup> See GAZZINI, *supra* note 142, at 62.



## MEDIATION'S POTENTIAL ROLE IN CULTURAL PROPERTY DISPUTES

### 4. *Mediation Maintains Workable Disputant Relationships*

As just mentioned, unlike highly contentious mechanisms such as litigation, and somewhat contentious mechanisms like arbitration, mediation facilitates positive future interactions between parties.<sup>187</sup> Because mediation is non-adversarial and encourages creative problem solving, parties can come to agreements which cooperatively preserve their relationships and lay the groundwork for the resolution of future disputes.<sup>188</sup> One such creative solution to cultural property disputes is the use of partage.<sup>189</sup> Partage is the process whereby source nations permit market nation archaeologists to excavate source nation archaeological sites and share their finds with source nation museums in exchange for the right to keep a portion of what they find for museums and private collectors in their home countries.<sup>190</sup> This type of solution—which a mediator might be able to suggest to two nations fighting over the dissemination of a source nation's cultural property—not only helps source nations locate and excavate their heritage, but it enacts a system by which the parties may exchange cultural property in the future.<sup>191</sup> While it is possible for non-third party negotiations to come up with this type of solution, the presence of a mediator can increase the likelihood of such a solution occurring. The characteristics of arbitration and litigation preclude this type of creativity.

### 5. *Mediation Promotes Interparty Cultural, Political, Religious, and Social Understanding*

Mediation facilitates cross-party understanding better than any other form of dispute resolution. Because parties to a mediated dispute may freely choose whomever they want to conduct their mediation, they can select a third party who understands the cultural, political, religious, or social differences that limit their ability to effectively communicate, and therefore

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<sup>187</sup> Stromberg, *supra* note 159, at 1398.

<sup>188</sup> Lawrence Susskind & Eileen Babbitt, *Overcoming the Obstacles to Effective Mediation of International Disputes*, in *MEDIATION IN INTERNATIONAL RELATIONS: MULTIPLE APPROACHES TO CONFLICT MANAGEMENT* 30, 31 (Jacob Bercovitch & Jeffrey Z. Rubin eds., 1992).

<sup>189</sup> CUNO, *supra* note 14, at xxiii, 14.

<sup>190</sup> *Id.*

<sup>191</sup> *See id.*

negotiate, by themselves.<sup>192</sup> This is particularly important in the cultural property world where disputant-stakeholders almost always come from different nations. Unless someone with cross-cultural understanding leads discussions, it is unlikely that parties with radically different expectations and cultural norms will ever permanently settle their disputes by themselves.<sup>193</sup>

Although parties engaged in arbitration can appoint a tribunal that understands their differences, arbitration is not as concerned as mediation with consensus, and therefore the arbitrators' knowledge of interparty differences only comes into play when they must apply substantive law to facts.<sup>194</sup> The same is true with litigation. Courts are under no obligation to take into account cultural, political, religious, or social differences which may directly affect party perceptions of what constitutes equitable judicial relief.<sup>195</sup>

A hypothetical will illustrate this point. Imagine that Greece sues a British museum in a British court under the Dealing in Cultural Objects (Offenses) Act 2003 for the repatriation of a 3,000-year-old marble statue carved by ancient Athens' most renowned sculptor, Praxiteles.<sup>196</sup> The statue ended up in the museum's collection after the museum purchased it in good faith from a dealer who looted it from an unexcavated temple in Attica. At trial, Greece presents evidence that, because the statue was one of two remaining original works by Praxiteles,<sup>197</sup> it bears special significance to the

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<sup>192</sup> Spain, *supra* note 145, at 838. An example of such a situation occurs when U.S. and Central American parties mediate disputes. Peters, *supra* note 169, at 1277. Whereas people from the U.S. prefer direct, person-to-person communications, Central Americans prefer indirect, group communications. *Id.* A mediator can help parties overcome these differences in culturally sensitive ways that facilitate negotiations without cultural incident. *Id.*

<sup>193</sup> Rebecca Golbert, *An Anthropologist's Approach to Mediation*, 11 CARDOZO J. CONFLICT RESOL. 81, 95 (2009). There is another benefit to parties being able to appoint the mediator intervening in the dispute. Unlike in litigation, in which parties must accept whatever judge they get, mediation permits disputants to select experts in international cultural property disputes, international relations, or the objects over which the parties wrangle. Carper & LaRocco, *supra* note 147, at 53.

<sup>194</sup> See Palmer, *supra* note 148, at 279.

<sup>195</sup> *Id.*

<sup>196</sup> For a brief background about Praxiteles, see Praxiteles in Encyclopedia Britannica On-Line, <http://www.britannica.com/EBchecked/topic/474116/Praxiteles> (last visited Aug. 24, 2010).

<sup>197</sup> The other, non-invented work being "Hermes Carrying the Infant Dionysus." *Id.*

## MEDIATION'S POTENTIAL ROLE IN CULTURAL PROPERTY DISPUTES

Greek people and should be returned to Attica, Praxiteles' home.<sup>198</sup> Despite this evidence, the court rules that because the museum did not purchase the statue with knowledge that it was stolen, it is under no obligation to return it.<sup>199</sup> While this ruling follows British law, it completely ignores the underlying cultural and political interests that Greece has in the Praxiteles sculpture, interests that a mediator could have identified and integrated into negotiations in a creative manner. Now, because of the court's ruling, it is likely that Greece will never again wish to cooperate with a British museum for fear of losing more of its cultural property.

### *6. Mediation Circumvents the Complicated Traits of Arbitration and Litigation*

Mediation allows parties to avoid the complicated legal issues associated with arbitration and litigation. Many source nations struggle to navigate the world's innumerable cultural property laws.<sup>200</sup> For example, if a source nation wishes to bring suit to recover a piece of its cultural property in the U.S., it must be prepared to contend with fifty different sets of state substantive and procedural laws, an overlaying federal law system, local court rules, and the unique application and interpretation of all these rules and laws by each judge before whom the case may appear.<sup>201</sup> Further complicating matters is that few cultural property regimes take root in uniform legal traditions.<sup>202</sup> This means, as the hypothetical about Praxiteles alluded to, that nations with civil law traditions, like France, will permit a good faith purchaser of stolen cultural property to keep the objects he or she purchases, while nations with common law traditions, like the United States, will not.<sup>203</sup>

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<sup>198</sup> *Id.*

<sup>199</sup> Dealing in Cultural Objects (Offenses) Act, *supra* note 106, § 1(1).

<sup>200</sup> See Peters, *supra* note 169, at 1256.

<sup>201</sup> *Id.*

<sup>202</sup> See Marc-André Renold, *Stolen Art: The Ubiquitous Question of Good Faith*, in RESOLUTION OF CULTURAL PROPERTY DISPUTES: PAPERS EMANATING FROM THE SEVENTH PCA INTERNATIONAL LAW SEMINAR 251, 252 (Int'l Bureau of the Permanent Ct. of Arb. ed., Kluwer Law Int'l 2004).

<sup>203</sup> *Id.*

A problem in litigation that faces both source and market nations is that it sometimes “miscarries.”<sup>204</sup> This means that if there is a hung jury, a mistrial, or if a judge makes some type of appealable procedural error, it is likely that the initial suit brought by a source nation will not settle the dispute.<sup>205</sup> A problem unique to market nations in litigation is that if a source nation wishes to sue a market nation, there are few rules which will preclude it from either (1) suing simultaneously in both its courts and the courts of the market nation it alleges illegally possesses its cultural property, or (2) filing suit in its own courts if its first suit filed elsewhere fails to achieve its goals.<sup>206</sup>

Arbitration and litigation also suffer from the fact that it is difficult for source nations to prove that the bodies with which they file their claims have jurisdiction.<sup>207</sup> Thus, regardless of the legitimacy of a source nation’s claim against a market nation, unless (1) the market nation agrees to submit to arbitration or (2) a tribunal or court holds that it has jurisdiction over the claim, there is no guarantee that the source nation will be able to get a binding judgment. Furthermore, arbitration and litigation focus on “backward-looking facts, evidence, and arguments asserting and defending legal rights rather than on present and future development of beneficial . . . solutions.”<sup>208</sup> Consequently, instead of using a dispute as an opportunity to better forge future relations between the parties as mediation does, arbitration and litigation attempt only to redress past harms, with minimal concern for the future implications of awards and holdings.<sup>209</sup>

Mediation overcomes all of these problems because it can set aside concerns about which law governs a dispute, which body has jurisdiction

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<sup>204</sup> Palmer, *supra* note 148, at 272.

<sup>205</sup> *Id.*

<sup>206</sup> See Stromberg, *supra* note 159, at 1340–41.

<sup>207</sup> See GAZZINI, *supra* note 142, at 51.

<sup>208</sup> Peters, *supra* note 169, at 1259. This problem is particularly lethal in cultural property disputes because, as mentioned in Part II, source nations rarely have concrete, physical evidence that a piece of cultural property comes from within its borders. Das, *supra* note 141, at 205. Mediation overcomes arbitration and litigation’s reliance on such proof because it does not require parties to present “clear and convincing proof” of ownership. *Id.* at 209. Instead, it merely requires that the parties negotiate with whatever evidence they have to achieve the most equitable outcome in light of each disputant-stakeholder’s interests. Thus, circumstantial evidence that is not usually given great weight in arbitration or litigation can have greater value in mediation.

<sup>209</sup> See *supra*, Part III.B.4.

## MEDIATION'S POTENTIAL ROLE IN CULTURAL PROPERTY DISPUTES

over a claim, and what types of evidence are admissible.<sup>210</sup> In mediation, all that matters is the parties' interests and their ability to forge a mutually beneficial agreement.<sup>211</sup>

### *7. Mediation Is Confidential and Saves Disputants Time and Money*

Mediation is superior to litigation because it is confidential,<sup>212</sup> and is superior to both arbitration and litigation because it is cheaper and less time-consuming.<sup>213</sup> Mediation is confidential (as is arbitration); before mediation begins, disputants can agree to make the proceedings and the result completely private.<sup>214</sup> Market nations prefer confidentiality because they do not want to publicly argue over whether their museums and collectors have knowingly purchased stolen goods while they themselves have turned a blind eye.<sup>215</sup> Litigation forces this discussion out into the public where the media and source nation activists can turn public sentiment against market nations and force them to repatriate things that they might not have had to otherwise.<sup>216</sup>

The time and monetary costs of arbitration and litigation also encourage parties to cultural property disputes to pursue mediated resolutions. Like litigation, arbitration can carry on for a great deal of time depending on how complicated the issues are.<sup>217</sup> It can also require many of the same expensive activities as litigation: drafting and submitting intricate briefs, conducting discovery, making oral arguments, deposing and examining witnesses, and traveling to foreign jurisdictions.<sup>218</sup> Each of these activities, whether they take place in arbitration or litigation, can be prohibitively expensive, and that is even before considering the costs of an appeal.<sup>219</sup> Because disputants, even those market nations with deep pockets, do not want to waste money

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<sup>210</sup> O'CONNELL, *supra* note 143, at 59.

<sup>211</sup> *Id.* at 72–73.

<sup>212</sup> Palmer, *supra* note 148, at 272.

<sup>213</sup> Das, *supra* note 141, at 198.

<sup>214</sup> GAZZINI, *supra* note 142, at 67.

<sup>215</sup> *Id.* at 77–78.

<sup>216</sup> *See id.*

<sup>217</sup> Das, *supra* note 141, at 198.

<sup>218</sup> *See* Stromberg, *supra* note 159, at 1385–86; Carper & LaRocco, *supra* note 147, at 50.

<sup>219</sup> Das, *supra* note 141, at 198.

pursuing drawn out claims with no guarantee of success, mediation offers them an attractive option to settling claims that is generally cheaper and less time-consuming.<sup>220</sup>

#### IV. STAKEHOLDERS AND THEIR INTERESTS IN CULTURAL PROPERTY

By now it is clear that mediation, more than any other dispute resolution mechanism, can provide parties to international cultural property disputes with a means by which they can quietly, cheaply, creatively, and equitably settle claims relating to culturally significant objects. However, in order to fully understand mediation's potential, it is necessary to examine the interests that are at stake in international cultural property disputes. The first subsection below does this. The second subsection takes this analysis a step further by suggesting what types of mediated solutions are available to parties who are willing to engage in mediation. This section exists, therefore, to provide disputant-stakeholders with tangible ideas for facilitating the equitable exchange of cultural property in the future.

##### *A. Stakeholder Interests in International Cultural Property Disputes*

There are two sets of stakeholders in the debate over the exchange of cultural property. One set, led by market nations, preaches the liberal trade of cultural property.<sup>221</sup> It argues for a world in which museums and private collectors can buy what they want, when they want.<sup>222</sup> The other, led by source nations, seeks the retention of cultural property by the states in which

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<sup>220</sup> See GAZZINI, *supra* note 142, at 59. The importance of the public nature and the costs of litigation cannot be stressed enough. In 2006, for example, the J. Paul Getty Museum in Los Angeles, California finally agreed to return over forty artifacts to Italy that Italy had long argued were looted. Elisabetta Povoledo, *Getty Agrees to Return 40 Antiquities to Italy*, N.Y. TIMES, Aug. 2, 2007, at E1. The Getty only agreed to do so after Italy proved that it was willing to take the Getty to court under the NSPA (by 2007 Italy had already sued a Getty curator and an affiliated antiquities dealer under the NSPA) and drag its name through the mud in the press accusing it of knowingly purchasing stolen property. *Id.*

<sup>221</sup> See *supra* Part II.

<sup>222</sup> GAZZINI, *supra* note 142, at 5 (Market nations resist "any principle that would imperil their vast public and private collections or would otherwise unnecessarily hamper the cultural property lucrative market.").

## MEDIATION'S POTENTIAL ROLE IN CULTURAL PROPERTY DISPUTES

it is found.<sup>223</sup> In order for these stakeholders to successfully mediate their international cultural property disputes, they need to understand why the other believes and argues what it does. It is only by understanding the interests that are at stake in a cultural property dispute that parties will ever be able to forge the relationships necessary to assure a continued exchange of cultural property. This subsection examines these interests in the hopes that with improved cross-party understanding, enlightened stakeholders will more readily mediate their disputes.

### 1. *Source Nation, Archaeologist, and Local Museum Interests*

The meta-interest that source nations, archaeologists, and museums native to source nations (i.e., local museums) share is a source nation's retention of the cultural property found within its borders.<sup>224</sup> This interest is so important that it has inspired a global system of near total embargoes on the international trade of cultural property.<sup>225</sup> In order to understand why source nations, archaeologists, and local museums use this meta-interest to justify retentionist cultural patrimony laws, it is necessary to understand the underlying interests.

The first underlying interest is the belief that unless source nations pass retentionist laws, looting will strip them of their ability to study their cultural property to better understand their histories and identities.<sup>226</sup> Source nations argue that unless they embargo the export of all known objects of cultural

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<sup>223</sup> *Id.* at 5 (“Art-rich nations (or source States), eager to obtain restitution of the numerous pieces removed from their territory and to affirm their complete control over their cultural patrimony, [defend] the principle of unconditional and uncompensated return of all cultural property transferred without proper authori[z]ation from the State of origin.”).

<sup>224</sup> BATOR, *supra* note 30, at 37.

<sup>225</sup> For examples of such laws, see the cultural patrimony laws of Egypt and Mexico referenced above in Part II.A's discussion of *United States v. Schultz* and *United States v. McClain*. Thailand provides another example. It has two laws on the topic—the Act of Ancient Monuments, Antiquities, Objects of Art and National Museums, B.E. 2504 (1961), and the Act on National Monuments, Antiques, Objects of Art and National Museums (No. 2), B.E. 2535 (1992). These laws combine to place the ownership of all movable man-made or naturally-occurring objects “buried in, concealed or abandoned within” Thailand which “[are] useful in the field of art, history, or archaeology” in the hands of the Thai government. MACKENZIE, *supra* note 35, at 63. These Acts also declare that none of these objects can be exported without a license from the government—something that rarely happens. *Id.* at 66.

<sup>226</sup> BATOR, *supra* note 30, at 27.

importance (including objects which have been legally excavated), so much of their history will leave their borders that their people, historians, and archaeologists will have nothing left to study.<sup>227</sup> This interest expresses that objects found within a source nation are “both a manifestation and a mirror of its culture.”<sup>228</sup> In other words, objects found within a source nation represent an earlier expression of that source nation, one that informs who it and its people are today.<sup>229</sup> At its root, this interest asserts that it is only through the local study of the objects found within source nations that source nations will ever be able to understand their identities; their “cultural, spiritual, even racial descent from the ancient peoples who made” them.<sup>230</sup>

It is important to note at this point why source nations believe that retentionist cultural patrimony laws will stop looting. They believe that if source nations make it illegal to export their cultural property, no market nation, market nation museum (i.e., universal museum), or foreign private collector will want to buy a cultural object without the clearest of legal provenance lest they have to repatriate it at great personal expense.<sup>231</sup> Thus, by making it difficult to acquire cultural property of questionable origin, source nations will decrease demand for looted objects, and undermine the practice.<sup>232</sup> Market nations, universal museums, and private collectors, however, are quick to point out that retentionist cultural patrimony laws have the opposite effect.<sup>233</sup> By making it difficult to possess any cultural property other than that which source nations have pre-approved (a rare occurrence under current cultural patrimony laws), source nations force market nations, universal museums, and private collectors to secretly and fraudulently revert

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<sup>227</sup> John Henry Merryman, *A Licit International Trade in Cultural Objects*, in THINKING ABOUT THE ELGIN MARBLES: CRITICAL ESSAYS ON CULTURAL PROPERTY, ART, AND LAW 244–45 (John Henry Merryman ed., 2009).

<sup>228</sup> BATOR, *supra* note 30, at 28.

<sup>229</sup> *Id.*

<sup>230</sup> CUNO, *supra* note 14, at xxxii.

<sup>231</sup> See BATOR, *supra* note 30, at 35–39; see also CUNO, *supra* note 14, at 127. Market nations refer to their museums as “universal museums” because they allegedly function like physical encyclopedias that allow people to come to compare and contrast objects from every corner of the earth and from all parts of human history. *Id.* at xxxi–xxxii. Universal museums are meant to emphasize that the “world’s artistic and cultural legacy [is] common to us all.” *Id.* at xxxii.

<sup>232</sup> Merryman, *supra* note 227, at 275.

<sup>233</sup> Hughes, *supra* note 2, at 132.



## MEDIATION'S POTENTIAL ROLE IN CULTURAL PROPERTY DISPUTES

to the black market to purchase foreign antiquities, art, and culturally significant objects.<sup>234</sup>

The second underlying interest is that, unless source nations impose retentionist cultural patrimony laws, archaeologists will lose their chance to draw all the knowledge they can from cultural property.<sup>235</sup> The argument behind this interest states that when a looter rips an object from its archaeological context and sells it abroad, archaeologists can no longer interpret the object within the historical context of the find site.<sup>236</sup> Thus, source nations allege that in order to fully understand their history, they must use all legal means necessary to preserve the archaeological integrity of their cultural property.<sup>237</sup> Their self-knowledge depends on it.

The third underlying interest is that unless source nations enact retentionist cultural property laws, they will lose the ability to profit from their history.<sup>238</sup> Source nations, archaeologists, and local museums believe that when local museums or archaeological sites display a source nation's cultural property, those museums or sites attract foreign tourists.<sup>239</sup> This not only increases international awareness of source nation history via local means, but it also increases source nation income.<sup>240</sup> For example, the Valley of the Kings in Egypt, the tomb of Qin Shihuangdi and his terra cotta warriors in China, and the city of Pompeii in Italy, as well as the museums which accompany them, generate large amounts of tourist revenue, revenue which Egypt, China, and Italy might not otherwise be able to produce.<sup>241</sup>

The fourth underlying interest is the most instinctual: it is wrong for a market nation to claim possession over objects found in the earth of another nation and produced by people from whom it did not descend.<sup>242</sup> Nationalistic to the core and profoundly simple, this interest suggests that if a

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<sup>234</sup> BATOR, *supra* note 30, at 41–42. Scholars also point out that in a world filled with poverty, starvation, and war, the only way to truly stop looting is to provide the looters with alternative means of making money to support their families. CUNO, *supra* note 14, at xxxiii. Though this is controversial, it may be inevitable that in the debate over the transmission of cultural property both sides will have to acknowledge the interests of the looters themselves.

<sup>235</sup> See Merryman, *supra* note 227, at 254–55.

<sup>236</sup> *Id.*

<sup>237</sup> CUNO, *supra* note 14, at 155.

<sup>238</sup> BATOR, *supra* note 30, at 27.

<sup>239</sup> *Id.*

<sup>240</sup> *Id.*

<sup>241</sup> See *id.*

<sup>242</sup> CUNO, *supra* note 14, at xxxii, 9.

source nation owns all the dirt within its borders—dirt it inherited from its ancestors—it owns everything found in that dirt as well.<sup>243</sup> Modern notions of state sovereignty demand no less.<sup>244</sup>

## 2. *Market Nation, Universal Museum, and Private Collector Interests*

Market nations, universal museums, and private collectors argue for the liberal international trade of cultural property.<sup>245</sup> These stakeholders put forth many reasons to support their position. The first is that the liberal trade of cultural property undermines ignorance, spreads cultural sensitivity, and promotes knowledge.<sup>246</sup> Because cultural property represents source nations, if the world is to ever fully understand all of its peoples, then objects which capture the essences of source nations must globally proliferate.<sup>247</sup> Second, the preservation of the world's collective past demands the liberal trade of cultural property. Source nations lack the financial, institutional, and scholarly resources to identify and preserve all of their archaeological resources.<sup>248</sup> Thus, if the world's cultural property is to be safe, it must be exported to market nations where universal museums and private collectors with adequate resources can properly preserve important historical objects for future generations.<sup>249</sup> Finally, and most philosophically, the liberal international trade of cultural property promotes the belief that the entire world owns cultural property—not just the nations in which it is found.<sup>250</sup> Because so many modern nations and people share common ancestral and cultural origins, no single nation may lay claim to any particular ancient culture.<sup>251</sup> Therefore, every person around the world deserves to have access to objects from every other part of the world. If they cannot have such access, as is the chief side effect of retentionist cultural patrimony laws, market

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<sup>243</sup> See generally *id.* at 9.

<sup>244</sup> *Id.*

<sup>245</sup> BATOR, *supra* note 30, at 30–32.

<sup>246</sup> *Id.* at 32.

<sup>247</sup> *Id.* at 31–32. According to Bator, art is a “good ambassador.” *Id.* at 30. “It stimulates interest in, understanding of, and sympathy and admiration for [the exporting] country.” *Id.*

<sup>248</sup> MERRYMAN, *supra* note 56, at 208.

<sup>249</sup> See BATOR, *supra* note 30, at 21.

<sup>250</sup> CUNO, *supra* note 14, at 20.

<sup>251</sup> *Id.*

## MEDIATION'S POTENTIAL ROLE IN CULTURAL PROPERTY DISPUTES

nations, universal museums, and private collectors argue that they will never be able to understand their common cultural and historical identities.<sup>252</sup>

To better understand these interests and how they relate to those of source nations, archaeologists, and local museums, it might be helpful to outline the counter-arguments that market nations, universal museums, and private collectors pose. First, as alluded to above, market nations, universal museums, and private collectors argue that source nations have no right to claim that the antiquities found within their borders actually inform who they, and they alone, are.<sup>253</sup> In many cases, modern nations share little in common with the ancient civilizations buried within their borders.<sup>254</sup> Take Egypt for example. Besides potentially being genetically different from the ancient Egyptians, modern Egyptians practice a different religion, eat different foods, and utilize a completely different form of government than their geographic predecessors.<sup>255</sup> Market nations, universal museums, and private collectors are also quick to point out that in many cases the ancient civilizations over which source nations claim possession span many different modern countries. Thus, for example, how is it that Italy can claim sole possession of Roman artifacts when Rome also conquered portions of other modern nations, such as France, Greece, Germany, Morocco, Libya, and Israel?<sup>256</sup>

Along these same lines, market nations, universal museums, and private collectors also ask how it is that source nations can claim possession over

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<sup>252</sup> *Id.* It should be mentioned that private collectors share many of the same interests as market nations and universal museums because they also appreciate cultural property's ability to inspire, inform, and subvert racial, cultural, and geographic insensitivity. JOHN HENRY MERRYMAN ET AL., LAW, ETHICS, AND THE VISUAL ARTS 961 (John Henry Merryman et al. eds., 2007). For many collectors, collecting is a means by which they can (1) trace a particular artistic or cultural idea through history, (2) pay homage to an individual artist or period, and (3) tangibly connect to the past. *Id.* Besides being personally edifying, collectors often collect in order to invest in property which does not quickly lose its value. *Id.* at 964. Furthermore, some collectors collect with the specific intention of leaving their collections to museums. *Id.* Scholars argue that it is through the gifting of private collections to museums that universal museums maintain their diverse holdings. *Id.* Because the tastes of collectors often differ from those of nearby museum curators, when a private collector contributes his collection to a nearby museum, he or she instantly adds to it works which the public might not have otherwise been able to see. *Id.*

<sup>253</sup> CUNO, *supra* note 14, at 9–10.

<sup>254</sup> *Id.*

<sup>255</sup> *Id.*

<sup>256</sup> See generally *id.* at 11.

objects whose creators were influenced by cultures which source nations argue “belong” to other modern nations.<sup>257</sup> Take Italy and ancient Italian works, for example:

Are they Italian because they derive from cultures said to have developed *autonomously* in the region of present-day Italy? Or have we simply chosen to identify them that way? They look like things we know to have been made by ancient peoples in the region of what is now, some nearly two thousand years later, Italy. Of course, they also look like things made in Greece, which in turn look like things made in Egypt, which themselves bear a resemblance to things made in the Ancient Near East. And then too, we see resemblances to things made more or less at the same time in Persia, the Steppes of Russia, and central Asia, not to mention across the Levant and northern Africa and up into Europe by way of the Balkans. And of course, too, each of these influences comprises currents of others, such that we can trace the ‘identity’ of ‘Italian’ works of art through a series of artistic and cultural encounters over much of the known world and over hundreds and hundreds of years.<sup>258</sup>

Second, while objects lose a portion of their archaeological, historical, and scientific value when someone removes them from their archaeological context, source nations, universal museums, and private collectors argue that they do not lose nearly as much as source nations allege.<sup>259</sup> In fact, because of their training, scholars can readily glean meaningful aesthetic, technological, iconographic, and epigraphic information from any culturally significant object, even a looted object.<sup>260</sup>

Third, even if source nations could generate a profit off of archaeological sites and their fruits, market nations, universal museums, and private collectors argue that they will never have enough resources to protect *all* of their archaeological sites and display *all* of the cultural property found therein.<sup>261</sup> Most source nations, like Italy and Turkey, have so many archaeologically important sites that it would literally take an army to protect them—and those are just the sites about which the Italian and Turkish

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<sup>257</sup> See generally *id.* at 135–36.

<sup>258</sup> *Id.*

<sup>259</sup> CUNO, *supra* note 14, at 9.

<sup>260</sup> *Id.*

<sup>261</sup> Merryman, *supra* note 56, at 159.

## MEDIATION'S POTENTIAL ROLE IN CULTURAL PROPERTY DISPUTES

governments are aware.<sup>262</sup> Furthermore, many source nations and local museums already have so many culturally important objects within their possession that they lack the institutional and human resources to ever be able to catalogue, preserve, and display them.<sup>263</sup> Thus, market nations, universal museums, and private collectors do not see why source nations should not share the cultural property which they cannot protect and display as adequately as a universal museum or private collector.<sup>264</sup>

### *B. Potential Solutions to Cultural Property Disputes Unique to Mediation*

With all of these interests in mind, it is helpful to examine a series of potential solutions that mediation offers to competing disputant-stakeholders in international cultural property disputes. For example, when a source nation seeks to repatriate a piece of its cultural property from a universal museum in a powerful and well-resourced market nation, a conscientious mediator might be able to frame the dispute in an “object-oriented” manner.<sup>265</sup> Framing the dispute in such a way calls for disputants to decide who should possess an object based upon the outcomes of three considerations: (1) which disputant can best preserve the object; (2) which disputant can best glean the historical, scientific, cultural, and aesthetic truths from the object; and (3) which disputant can best grant the public access to the object.<sup>266</sup> Negotiations with a mediator who frames the dispute this way address a number of stakeholder interests, like the indefinite preservation of pieces of cultural property and the assurance of scholarly and public access to important finds. An object-oriented policy might not explicitly address legitimate claims to objects based solely upon the grounds of state sovereignty or state identity. However, by framing a dispute in terms that focus on other important interests, source nations might be more willing to negotiate to allow market nations to keep important objects if, for example, market nations either (1) promise to pay

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<sup>262</sup> BATOR, *supra* note 30, at 36. Bator also points out that even if source nations possessed the police resources necessary to protect every site within their borders, there is no guarantee that these guards would not begin looting sites themselves. *Id.*

<sup>263</sup> MERRYMAN, *supra* note 56, at 187.

<sup>264</sup> *See id.* at 186–89.

<sup>265</sup> *Id.* at 163–64.

<sup>266</sup> *Id.* at 211.

the source nations for continued possession, or (2) return the objects to the source nation once it can prove that it can actually take care of them.<sup>267</sup>

Another example of a potential mediated solution might be to arrange the repatriation of disputed objects in such a way that no party in particular will lose large amounts of money in the process. This happened in 1993, when the Michael Ward Gallery of Manhattan agreed to donate a collection of Mycenaean jewelry and ornaments from the 15th century B.C. worth \$1.5 million to the U.S.-based Society for the Preservation of the Greek Heritage in Washington that would in turn repatriate them to the Greek people.<sup>268</sup> As the gallery owner observed, this would not only save him thousands of dollars in litigation expenses and acknowledge his respect for the sovereignty of the Greek people,<sup>269</sup> but it would allow his gallery to recover a significant portion of money it spent to acquire the objects through the tax breaks it would receive for its donation to a nonprofit.<sup>270</sup>

Other potential solutions which mediation is uniquely positioned to propose are, for example, partage,<sup>271</sup> source nations agreeing to “loan” pieces to universal museums or foreign private collectors for an indefinite period of time,<sup>272</sup> or, as mentioned above, “renting” or “leasing” pieces to universal

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<sup>267</sup> An object-oriented policy is a particularly equitable approach to the resolution of cultural property disputes that extends to objects like the Elgin Marbles, objects allegedly crucial to a source nation's identity yet removed from their borders long before it was illegal to do so. For hundreds of years, the British Museum argued that it could not return the Marbles in good conscience because the Greeks were not institutionally equipped to preserve and display to a wide audience the world's best examples of original ancient Greek sculpture. Susan Emerling, *Is Greece Losing Its Elgin Marbles?*, HELLENIC TIMES, Sept. 4, 2009, at A7. However, as of June of 2009, these arguments ring hollow because Greece has built into the side of the Acropolis a state-of-the-art, \$200 million, 226,000-square-foot museum designed specifically to display the Elgin Marbles and other important works discovered in Athens. Suzanne Muchnic, *Showcase for the Acropolis*, L.A. TIMES, Jan. 24, 2010, at E14. The museum overlooks the city and features a glass-encased top floor into which light will pour and emblazon the highly conditioned and filtered air around the space set aside for the Marbles. *Id.* This museum proves that Greece has the resources to preserve the Marbles. *Id.* It will attract tourists and grant scholars the ideal setting in which to examine the Marbles. *Id.*

<sup>268</sup> Rita Reif, *Greece and Gallery Settle*, N.Y. TIMES, Dec. 31, 1993, at C2.

<sup>269</sup> *Id.*

<sup>270</sup> GAZZINI, *supra* note 142, at 60.

<sup>271</sup> See *supra* Part III.B.4; CUNO, *supra* note 14, at xxxiii, 14.

<sup>272</sup> See, e.g., Janice Arnold, *Recovered Nazi-Looted Art to Remain in Spain with Ex-Owner*, CANADIAN JEWISH NEWS, Mar. 8, 2007, at 25.

## MEDIATION'S POTENTIAL ROLE IN CULTURAL PROPERTY DISPUTES

museums or foreign private collectors for an indefinite period of time.<sup>273</sup> These three options are important because they allow source nations to reinforce their state sovereignty by retaining title to a great number of objects leaving their borders while at the same time granting market nations and their citizens access to important objects foreign to them.

### V. CONCLUSION

Mediation is the best means by which to settle international cultural property disputes. It encourages disputant-stakeholders—whether they be universal or local museums, source or market nations—to cooperatively negotiate mutually beneficial and highly creative agreements that respect every disputant-stakeholder's interests.<sup>274</sup> Such resolutions are imperative if we wish to put a stop to the near total embargoes that source nations have currently placed on international transmission of cultural property.<sup>275</sup> This is particularly true in light of the facts that (1) current legal regimes governing the international transmission of cultural property, which operate largely on a litigation basis and include the UNESCO Convention, have failed to adequately protect source nations and (2) more and more source nation cultural property slips out of their borders and into foreign hands on a daily basis.<sup>276</sup> While disputed interests like state sovereignty, identity, and imperialistic perceptions that universal museums are the “best” at displaying cultural property are important to keep in mind, much more is at stake than source or market nation pride. At stake is knowledge itself. Unless disputant-stakeholders engage in a system which creatively encourages the equitable spread of cultural property—one which acknowledges the interests of all stakeholders—it is likely that the world will someday face a complete freeze on the exchange of newly discovered archaeological, artistic, and historically significant objects which inform who we are as a human race. At the end of the day, it is this tragedy, more than any other, that mediation helps overcome. This, regardless of its voluntary nature, is why disputant-stakeholders must embrace mediation.

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<sup>273</sup> See Palmer, *supra* note 148, at 280.

<sup>274</sup> GAZZINI, *supra* note 142, at 62.

<sup>275</sup> See BATON, *supra* note 30, at 10.

<sup>276</sup> See MERRYMAN, *supra* note 56, at 210; *see also* Merryman, *supra* note 227, at 268.

